134-306

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. ~~440~~. 173

JOSIAH H. DE WITT AND JOSIAH H. DE WITT, JR.,
PLAINTIFFS IN ERROR,

vs.

JOSEPH H. BERRY AND THOMAS BERRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 13, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 449.

JOSIAH H. DE WITT AND JOSIAH H. DE WITT, JR., PLAINTIFFS IN ERROR,

vs.

JOSEPH H. BERRY AND THOMAS BERRY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate and return	2	1
Transcript from State court	3	2
Summons	3	2
Complaint	5	2
Notice of appearance	8	3
Petition for removal	10	4
Bond for removal	13	5
Order for removal	15	6
Rule on removal	16	7
Appearance for defendants	17	7
Bill of particulars (plaintiffs)	18	7
Answer	21	8
Reply	25	10
Bill of particulars (defendant's)	28	11
Amendment to answer	30	11
Minutes of trial	33	12
Order denying motion for new trial	35	13
Judgment	37	14
Bill of exceptions	40	14
Testimony of Alfred Hooper	40	14
Contract in suit	42	15
Defendants' Exhibit A—Letter of A. Hooper, manager, to De Witt & Son, Nov. 5, 1881	49	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, JANUARY 23, 1889.

thereto, do hereby certify that the following pages, numbered from one to one hundred and thirty-eight, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Josiah H. De Witt and Josiah H. De Witt, Jr., plaintiffs in error, against Joseph H. Berry and Thomas Berry, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this eighth day of October, in the year of our Lord one thousand eight hundred and eighty-six and of the Independence of the United States the one hundred and eleventh.

[Seal of U. S. Circuit Court, South. Dist. New York.]

TIMOTHY GRIFFITH, *Clerk.*

3 *Summons.*

Marine Court of the City of New York.

JOSEPH H. BERRY, THOMAS BERRY
against
JOSIAH H. DE WITT, JOSIAH H. DE WITT, Jr.

To the above-named defendant-:

You are hereby summoned to answer to the complaint in this action and to serve a copy of your answer on the plaintiffs' attorney within six days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated N. Y., Nov. 29th, 1882.

P. Q. ECKERSON,
Plaintiffs' Att'y.

Office and post-office address: No. 99 Nassau St., N. Y.

4 [Endorsed:] —court. Summons. To the defendant-: Notice is hereby given to you that on your default judgment will be taken against you for the sum of $— from the — day of ——, 18—. Yours respectfully, —— ——, plaintiffs' att'y.

5 Marine Court of the City of New York.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT, JOSIAH H. DE WITT, Jr.

The plaintiffs, complaining of the above-named defendant-, allege and say—

1st. That during all the times hereinafter mentioned plaintiffs were copartners, doing business under the firm name of Berry Brothers.

2. That between Nov. 9, 1881, and May 15, 1882, both inclusive, the plaintiffs sold and delivered to defendants at their request goods, wares, and merchandise, consisting of varnish, &c., and that defendants were copartners.

3rd. That said goods were reasonably worth the sum of sixteen hundred and eighty-seven $\frac{51}{100}$ dollars, and which sum defendant agreed to pay therefor. Part thereof has been paid. Wherefore plaintiffs demand judgment against the defendants for the sum of sixteen hundred and eighty-seven $\frac{51}{100}$ dollars, with interest thereon since May 15th, 1882, besides costs of this action.

Dated Nov. 20th, 1882.

P. Q. ECKERSON,
Pl'ffs' Att'y.

6 CITY AND COUNTY OF NEW YORK, *ss.:*

Alfred Hooper, being duly sworn, says that he has read the foregoing complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that deponent is the agent of the plaintiffs, having entire charge of their business in the city of New York, and that all the material allegations in complaint are within the personal knowledge of deponent.

ALFRED HOOPER.

Sworn to before me this 21st day of Nov., 1882.

H. C. VAN VECHTEN,
Com'r Deeds, N. Y. City.

7 [Endorsed:] N. Y. marine court. Joseph H. Berry *et al.* ag'st Josiah H. De Witt. Summons & complaint. P. Q. Eckerson, pl'ffs' att'y, 99 Nassau St., N. Y. city.

8 *Notice of Appearance.*

Marine Court, City of New York.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

SIR: Please to take notice that the defendants, Josiah H. De Witt and Josiah H. De Witt, Jr., appear in this action, and that I am retained as attorney for them therein, and demand that a copy of the complaint and all papers in this action be served on me at my office, number 206 B'way.

Dated N. Y., December 20th, 1882.

Yours, &c., HENRY C. DE WITT,
Attorney for Defendants.

Office and post-office address, 206 Broadway, New York.

To P. Q. Eckerson, Esq., plaintiffs' att'y, 99 Nassau St., N. Y.

9 [Endorsed:] —— —— against —— ——. Notice of appearance. Schatz & De Witt, 206 Broadway, New York, attorney for defendants. Due service of a notice, of which the within is a copy, admitted this — day of ——, 18—. —— ——, plaintiffs' attorney.

10 Marine Court, City of New York.

JOSEPH BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

To the marine court:

The petition of Josiah H. De Witt and Josiah H. De Witt, Jr., shows that the said Joseph H. Berry and Thomas Berry have brought a suit of a civil nature at law against your petitioners, and the same is now pending in the marine court of the city of New York.

II. That said suit is brought upon the following cause, to wit: An alleged sale and delivery to these defendants by said plaintiffs of goods, wares, and merchandise stated to be of the value of sixteen hundred and eighty-seven and $\frac{51}{100}$ ($1,687.51) dollars.

III. That the matter in dispute exceeds, exclusive of costs, the sum of five hundred ($500) dollars, as appears by the summons and complaint in this action, which were served on the defendants on or about the 16th day of December, 1882, in which the plaintiffs demand judgment against the defendants "for the said sum of $1,687.51," and said cause is not at issue and defendants' time to answer the complaint has not yet expired.

11 IV. That the controversy in said suit is entirely between citizens of different States. The plaintiffs, Joseph H. Berry and Thomas Berry, are and were at the time of the commencement of this action citizens of the State of Michigan, there resided, and do now reside at Detroit, in said State; and your petitioners are and were at the commencement of this action citizens of the State of New York, and did then reside and do now reside in the city and county of New York.

V. That your petitioners desire to remove such suit from the said marine court to the circuit court of the United States, and they hereby make and file herewith a bond, with good and sufficient sureties, for their entering in said circuit court on the first day of its next session a copy of the record in said suit and for paying all costs that may be awarded by the said circuit court if said court should hold that such suit was wrongfully and improperly removed thereto.

Your petitioners therefore ask that the said cause may be removed for trial into the next circuit court to be held in the district where the same is pending, to wit, into the next circuit court for the southern district of the State of New York, pursuant to the provisions of the statutes of the United States in such case provided, and that this court do accept the sureties offered by your petitioners as aforesaid, and proceed no further in said cause.

JOSIAH H. DE WITT.
JOSIAH H. DE WITT, JR.

CITY AND COUNTY OF NEW YORK, *ss:*

12 Josiah H. De Witt, having been duly sworn, says for himself that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOSIAH H. DE WITT.

Sworn to before me this 10th day of January, 1883.

HENRY FITZ-RANDOLPH,
Notary Public (133), *N. Y. Co.*

CITY AND COUNTY OF NEW YORK, *ss:*

Josiah H. De Witt, Jr., being duly sworn, says for himself that he has read the foregoing petition subscribed by him and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOSIAH H. DE WITT, JR.

Sworn to before me this 10th day of January, 1883.

HENRY FITZ-RANDOLPH,
Notary Public (133), *N. Y. Co.*

13 Know all men by these presents that we, Josiah H. De Witt and Josiah H. De Witt, Jr., as principals, and Thomas N. Bolles, of the State of New York, and D. R. Morse, of the same place, as sureties, are held and firmly bound unto Joseph H. Berry and Thomas Berry in the penal sum of one thousand (1,000) dollars; for the payment whereof, well and truly to be made unto the said Joseph H. Berry and Thomas Berry, their heirs and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents.

Yet upon these conditions: The said Josiah H. De Witt and Josiah H. De Witt, Jr., having petitioned the marine court of the city of New York for the removal of a certain cause therein pending, wherein the said Joseph H. Berry and Thomas Berry are plaintiffs and Josiah H. De Witt and Josiah H. De Witt, Jr., are defendants, to the circuit court of the United States for the southern district of New York:

Now, if the said Josiah H. De Witt and Josiah H. De Witt, Jr., your petitioners, shall enter into the said circuit court of the United States on the first day of its next session a copy of the record in said suit and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that

said suit was wrongfully or improperly removed thereto, then this obligation shall be void; otherwise to remain in full force and virtue.

Witness our hands and seals this — day of January, A. D. 1883.

JOSIAH H. DE WITT. [L. S.]
JOSIAH H. DE WITT, JR. [L. S.]
THOMAS BOLLES. [L. S.]
D. R. MORSE. [L. S.]

14 STATE OF NEW YORK, }
City and County of New York, } *ss:*

Thomas N. Bolles and D. R. Morse, the sureties named in the foregoing bond, being duly sworn each for himself, doth depose and say that he is a resident of the State of New York and a property holder therein, and that he is worth the sum of two (2) thousand dollars over and above all debts and liabilities and exclusive of property by law exempt from execution, and that he has property in the State of New York liable to execution of the value of more than two thousand dollars.

THOMAS N. BOLLES.
D. R. MORSE.

Sworn to before me this ninth day of January, 1883.

HENRY FITZ-RANDOLPH,
Notary Public (133), *N. Y. Co.*

15 At a special term of the marine court of the city of New York, held at the city hall, in the city of New York, at the chambers thereof, on the 11th day of January, 1883.

Present: Hon. Ernest Hall, justice.

JOSEPH H. BERRY and THOMAS BERRY, Plaintiffs,
against
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr., Defendants.

A petition having been filed by the defendants, Josiah H. De Witt and Josiah H. De Witt, Jr., bearing date the — day of January, 1883, praying for the removal thereof into the circuit court of the United States for the southern district of New York, pursuant to the statutes of the United States in such case made and provided, and said petitioners having made and filed therewith a bond, with good and sufficient surety, pursuant to the directions of and as required by the said statutes—

Now, on motion of Mason W. Tyler, of counsel for the petitioners—

Ordered that this court accept sureties and bond and proceed no further in such suit, and that such suit be, and the same hereby is, removed into the circuit court of the United States for the southern district of New York.

A copy.
[L. S.] JOHN SAVAGE, *Clerk.*

15½ (Endorsed:) U. S. circuit court. Joseph H. Berry *et al.* ag'st Josiah H. De Witt, Jr. Copy — record. Mason W. Tyler, of counsel for def't-, 167 B'dway. U. S. circuit court. Filed Jan. 13, 1883. Joseph M. Deuel, clerk.

16 U. S. Circuit Court, Southern Dist. of New York.

JOSEPH H. BERRY and THOMAS BERRY
ag'st
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

This action having been originally commenced in the marine court of the city of New York and having been duly removed to this court, and said defendants having this day filed a copy of the record herein in this court, and said defendants having appeared by Mason W. Tyler, Esq., their counsel, now, on motion of Mason W. Tyler, Esq., counsel for said defendants, it is ordered that the cause do proceed in this court as if it had been originally commenced therein, and that the appearance of Mason W. Tyler for said defendants be, and the same hereby is, noticed & entered.

Dated January 12th, 1883.

17 U. S. Circuit Court, So. District of New York.

JOSEPH H. BERRY and THOMAS BERRY
vs.
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

To the clerk of the circuit court, southern district of New York:

SIR: You will please enter my appearance as attorney for the above-named defendants in the above-entitled action.

Yours, &c., HENRY C. DE WITT.

Office & post-office address, 206 Broadway, N. Y. city.

(Endorsed:) U. S. circuit court, so. dist. of New York. Joseph H. Berry & ano. *vs.* Joshiah H. De Witt & ano. Appearance of Henry C. De Witt. U. S. circuit court. Filed Apr. 12, 1883. Timothy Griffith, clerk.

18 *Plaintiffs' Bill of Particulars.*

Marine Court of the City of New York.

JOSEPH H. BERRY & THOMAS BERRY
against
JOSIAH H. DEWITT & JOSIAH H. DEWITT, Jr.

1881.			
Nov.	9.	To 10 bbls. T. japan, 55 cts.	270 88
"	30.	To 11 bbls. T. japan, 55 cts.	277 20
1882.			
Jan.	9.	To 8 bbls. T. japan, 55 cts., & 2 bbls. T. copal, 65 cts.	288 93
Feb.	9.	To 8 bbls. T. japan, 55 cts., & 2 bbls. T. copal, 65 cts.	284 28
Mar.	15.	To 8 bbls. T. japan, 55 cts., & 1 bbls. T. copal, 65 cts.	246 08
April	29.	To 4 bbls. T. japan, 55 cts., & 3 bbls. T. copal, 65 cts.	208 76
May	15.	To 4 bbls. T. japan, 55 cts.	111 38
			$1,687 51

CITY AND COUNTY OF NEW YORK, *ss:*

Alfred Hooper, being duly sworn, says that the above is a true and correct statement and bill of particulars of the items referred to in the complaint in the above-entitled action; that deponent is the agent of the plaintiffs, having entire charge of the plaintiffs' business in the city of New York, and all the facts therein stated
19 are within the personal knowledge of deponent.

ALFRED HOOPER.

Sworn to before me this 23rd day of Dec., 1882.

H. C. VAN VECHTEN,
Com'r Deeds, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss:*

Frank Brockway, being duly sworn, says that on the 23rd day of December, 1882, at No. 206 B'way, N. Y., he served a copy of the within upon Henry C. De Witt, def'ts' att'y, by delivering to and leaving the same with a clerk in said att'y's office, he being absent.

FRANK BROCKWAY.

Sworn to before me this 23rd day of Dec., 1882.

H. C. VAN VECHTEN,
Com'r of Deeds, N. Y. City.

[Endorsed:] N. Y. marine court. Joseph H. Berry *et al.* ag'st Josiah H. De Witt *et al.* Bill of particulars. P. Q. Eckerson, pl'ffs' att'y, 99 Nassau St. Due service of a copy of the within bill is hereby admitted. Dated Dec. —, 1882.

20 [Endorsed:] U. S. circuit court, southern district of New York. Joseph H. Berry *et al.*, plaintiffs, ag'st Josiah H. De Witt *et al.*, defendants. Bill of particulars of defendants' counterclaim. Henry C. De Witt, att'y for defendants. Office and P. O. address, 206 B'way, N. Y. city. Tremain & Tyler, of counsel. Due and timely service of the within is hereby admitted. Service made in court Sept. 5 on Mr. Eckerson personal-y by H. E. T.

21 Circuit Court of the United States for the Southern District of New York.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

The above-named defendants, answering plaintiffs' complaint, show to this honorable court:

I. These defendants admit that plaintiffs agreed to sell to defendants, as copartners, goods, wares, and merchandise on or about or prior to the dates mentioned in the complaint, and of the value of $\$1{,}687\frac{51}{100}$, or thereabouts.

Defendants agreed to pay therefor the value thereof.

II. First. Further answering, defendants deny that the said goods, wares, or merchandise so bought and agreed to be sold were ever delivered to the defendants or that any sum of money whatever is due and owing from defendants to plaintiffs.

Second. And, for a further and separate defense and counter-claim, the defendants allege that on or about June 24th, 1881, plaintiffs agreed to sell and deliver to defendants within one year thereafter twenty (20) barrels turpentine copal varnish at 65 cts. per gallon and eighty (80) barrels turpentine japan dryer at 55 cents per gallon, eight (8) barrels of said turpentine and two (2) barrels of said varnish to be delivered each month commencing September, 1881; that plaintiffs failed and neglected to deliver said goods as agreed or fraudulently substituted inferior articles which they falsely called a japan varnish and which were not turpentine goods, but were known, as defendants have since learned, as Union goods, and are compounded of cheap and inferior substances and made to resemble in appearance the turpentine copal varnish and turpentine japan dryer; that such inferior articles were delivered to these defendants, and the defendants supposed they were the articles they had contracted for and accordingly used them in their factory in preparing the wares manufactured by defendants; and by reason of the fraudulent character of the said articles so delivered to the defendants as varnish and Japan the paint and varnish did not adhere to said wares, but evaporated and crumbled away, so that some of the customers of defendants' house have returned said wares and some have refused and neglected to pay for the same on account of the inferior quality of the said japan and varnish used in painting the same, to the great loss and damage of defendants in destruction of goods, loss of time, labor, and steam power expended on the same, as well as loss of trade in consequence thereof, amounting to ten thousand ($10,000) dollars and upwards.

Wherefore defendants demand that the said complaint be dismissed, and that they have judgment against the said plaintiffs for the sum of $10,000, together with the costs and disbursements of this action.

TREMAIN AND TYLER.

Office and post-office address, 167 Broadway, N. Y. city.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Josiah H. Dewitt, being duly sworn, doth depose and say that he is one of the plaintiffs above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOSIAH H. DEWITT.

Sworn to before me this 13 day of January, 1883.

[L. S.] HENRY T. RANDOLPH.
Notary Public, No. 133, N. Y. Co.

(Endorsed:) N. Y. marine court. Josiah H. Berry & Thomas Berry, plaintiffs, against Josiah H. De Witt & Josiah H. De Witt,

Jr., defendants. Answer. Tremain & Tyler, def'ts' att'ys, 167 B'dway, N. Y. (Endorsed:) U. S. circuit court. Filed Jan. 13, 1883. Joseph M. Deuel, clerk.

25 Circuit Court of the United States for the Southern District of New York.

JOSEPH H. BERRY and THOMAS BERRY
ag'st
JOSIAH H. DEWITT and JOSIAH H. DEWITT, Jr.

The plaintiffs, replying to the counter-claim of the defendant- set up in their answer, herein allege—

1st. That the plaintiffs delivered to the defendants all the goods and merchandise referred to in said counter-claim in accordance with the aggreement made and entered into between plaintiffs and defendants, and the plaintiffs performed each and every part of said contract on their part.

II. The plaintiffs deny each and every other allegation contained in said counter-claim.

III. The plaintiffs allege that, on information and belief, *that* if said defendant- suffered any damage whatever from the use of said varnish japan it was & caused solely by the negligence of the defendants and by no fault or negligence of these plaintiffs.

26 Wherefore plaintiffs demand judgment dismissing the counter-claim herein and judgment for amount claimed in the complaint herein, and for costs.

P. Q. ECKERSON,
Pl'ffs' Att'y.

CITY AND COUNTY OF N. Y., *ss:*

Alfred Hooper, being duly sworn, says that he has read the foregoing reply and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated to be alleged upon information and belief, and as to those matters he believes it to be true; that deponent is the agent of the plaintiff-, having charge of their business in the city of New York, and that all the material allegations in the reply are within the personal knowledge of deponent.

ALFRED HOOPER.

Sworn to before me this 2nd day of Feb'y, 1883.
[L. S.] ORIENT H. COLLIN,
Notary Public (195), *County of New York.*

27 [Endorsed:] U. S. circuit court. Joseph H. Berry *et al. vs.* Josiah H. Dewitt *et al.* Reply. P. Q. Eckerson, pl'ffs' att'y, 99 Nassau St. (Endorsed:) U. S. circuit court. Filed Feb. 2, 1883. Joseph H. Deuel, clerk.

28 Circuit Court of the United States for the Southern District of New York.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DEWITT and JOSIAH H. DEWITT, Jr.

The bill of particulars of defendants' counter-claim herein shows to this honorable court:

I. That the plaintiffs composing the firm of Berry Brothers are indebted to the defendants on account of the damage to three million five hundred thousand (3,500,000) square feet of wire window-screen cloth, damaged between the first day of August, 1881, and the fifteenth day of June, 1882, as stated in the answer, by the use of material furnished defendants by plaintiffs under (and in violation of) agreement sued upon, being one-half a cent damage on each square foot of said wire cloth so manufactured by defendants and amounting in the aggregate to seventeen thousand five hundred dollars ($17,500.00).

29 II. Above are the particulars of defendants' counter-claim in this action.

HENRY C. DEWITT,
Attorney for Defend'ts.

MESSRS. TREMAIN AND TYLER, *Of Counsel.*

CITY AND COUNTY OF NEW YORK, *ss:*

Josiah H. Dewitt, of said city, one of the aboved-named joint defendants, being duly sworn, deposes and says that the foregoing account is in all respects true, and is a true account of the counter-claims against the plaintiffs in the above-entitled action.

J. H. DE WITT.

Subscribed and sworn to before me this 28th day of April, 1883.
WALTER R. BEACH,
Notary Public, N. Y. Co.

(Endorsed:) Service made in court, Sept. 5, on Mr. Eckerson personally by H. E. T.

30 *Amendment to Answer.*

United States Circuit Court, Southern District of New York.

JOSEPH H. BERRY and Others, Plaintiffs,
vs.
JOSIAH H. DE WITT and Another, Defendants.

By adding before the prayer of the answer the following:

As a further paragraph, and by way of amendment to the defendants' answer and by leave of the court first had and obtained, the defendants show this court their damages suffered by reason of plaintiffs' acts as aforesaid arise, among other things, because of the following facts:

That goods to large amounts that have been painted with plain-

tiffs' said merchandise and which was delivered by defendants in the usual course of business to their customers were returned to defendants for the reason aforesaid, and as a consequence of using plaintiffs' merchandise, the sales thereof were cancelled, and amounts paid by defendants as expenses of said return and for stripping and repainting such goods, and for stripping and repainting the stock of such goods in defendants' warehouse originally produced from and painted with plaintiffs' said merchandise, five thousand dollars, viz: There was stripped and painted of goods returned and on hand at least 430,000 feet, at a cost of one-half cent per foot, amounting to $2,150.

31 On said goods also there was a loss, in consequence of depreciation in their character, of about one cent per foot, resulting directly from the aforesaid circumstances, and amounting to $4,300.

And as further damage these defendants also show to this court that some of said cloth painted with plaintiffs' goods as aforesaid, to wit, 75,000 square feet, was figured cloth of an expensive kind, and by reason of stripping and repainting it as above mentioned and in consequence of the use of plaintiffs' merchandise as hereinbefore set forth there was a special loss of three dollars per hundred square feet, making a further loss or damage of $2,200.

And in addition to the foregoing items of damage defendants also show that they were generally damaged in and about their said business because of the plaintiffs' acts aforesaid — the sum of ten thousand dollars.

Wherefore defendants claim damage, as heretofore prayed in the answer and in the bill of particulars, in accordance therewith.

HENRY C. DE WITT,
Attorney for Defendants.

TREMAIN & TYLER, *Of Counsel.*

32 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Josiah H. De Witt, being duly sworn, deposes and says that he is one of the defendants herein, and he has read the foregoing amendment to the answer herein and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

JOSIAH H. DE WITT.

Sworn before me this — day of January, 1886.
[L. S.]
TIMOTHY A. FAY,
Notary Public (42), *New York County.*

Endorsed: U. S. circuit court, southern district of New York. Joseph H. Berry & ano., plaintiff-, ag't Josiah H. De Witt & ano. Am't to answer. Henry C. De Witt, att'y for def't-. U. S. circuit c't. Fil'd Jan'y 15th, 1886. Timothy Griffith, cl'k.

33 At a stated term of the circuit court of the United States of America for the southern district of New York, in the

second circuit, held at the United States court-rooms, in the city of New York, on Friday, the 23d day of October, in the year of our Lord one thousand eight hundred and eighty-five.

Present: The Honorable Nathaniel Shipman, judge.

JOSEPH H. BERRY and THOMAS BERRY
vs.
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

Now comes the plaintiffs, by Mon & Parsons, Esqs., their attorneys, and move the trial of this cause. Likewise come the defendants, by Tremain and Tyler, Esq., their attorneys. Thereupon a jury is empanelled and the cause proceeds to trial. After hearing the evidence of the parties, the argument of counsel, and the instructions of the court, on Friday, November 6th, 1885, the jury retire, and on their return render a verdict, whereby they
34 find for the plaintiffs the sum of two thousand and thirty-six dollars and twenty-five cents ($2,036.25). It is ordered that the defendants has a stay of proceedings on said verdict for forty-five days from November 6th, 1885.

A copy.

TIMOTHY GRIFFITH, *Clerk.*

35 At a circuit court of the United States for the southern district of New York, held at the U. S. court, in the post-office building, in the city of New York, on the 4th day of June, 1886.

Present: Hon. Nathaniel Shipman, judge.

JOSEPH H. BERRY and THOMAS BERRY
ag'st
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

On reading and filing the notice of motion herein on the part of defendants for a new trial and the affidavits of Josiah H. Dewitt and Henry C. Dewitt in support of said motion and the affidavits of Joseph H. Berry & Thomas Berry in opposition thereto and after hearing Henry E. Tremain, Esq., counsel of defendants, in favor of said motion and John E. Parsons, Esq., counsel of plaintiffs,
36 in opposition, ordered that said motion for a new trial be, and the same is hereby, denied and that judgment be entered herein in favor of plaintiffs against the defendants for amount found by the jury and interest thereon since the verdict was rendered, with costs of this action.

N. SHIPMAN, *Judge.*

[Endorsed:] U. S. circuit court. Joseph H. Berry *et al.* ag'st Josiah H. De Witt *et al.* Order denying motion for new trial. P. Q. Eckerson, pl'ffs' att'y, 99 Nassau St., N. Y. city. U. S. circuit court. Filed June 24, 1886. Timothy Griffith, clerk.

37 U. S. Circuit Court for Southern District of New York.

JOSEPH H. BERRY & THOMAS BERRY
ag'st
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

The issues in this action having been brought on for trial before Mr. Justice Shipman and a jury at a circuit term of said court held at the U. S. court-rooms, in the post office in the city of New York, on the 23 day of October, 1885, and the issues having been tried and a verdict for the plaintiffs having been duly rendered on the 6th day of November, 1885, and the plaintiffs' costs having been duly taxed at seventy-nine $\frac{22}{100}$ dollars, and the interest on the amount of said verdict to date being $62\frac{10}{100}$, now, on motion of P. Q. Eckerson, attorney for said plaintiffs, it is adjudged that said Joseph H. Berry and Thomas Berry, plaintiffs, recover of said defendants, Josiah H. De Witt and Josiah H. Dewitt, Jr., two thousand and thirty-six $\frac{25}{100}$ dollars found by the jury, and sixty-two $\frac{10}{100}$ dollars interest on said verdict, with seventy-nine $\frac{22}{100}$ dollars costs, amounting in all

38

2,036	25	to the sum of two thousand one hundred and seventy-seven $\frac{57}{100}$ dollars, and that said plaintiffs have execution therefor.
62	10	
79	22	
$2,177	57	Judgment signed this 10th day of July, A. D. 1886

JOHN A. SHIELDS,
Deputy Clerk.

39 [Endorsed:] U. S. circuit court for the south. dist. of New York. Joseph H. Berry and Thomas Berry, plaintiffs, against Josiah H. De Witt and Josiah H. De Witt, Jr. Judgment. P. Q. Eckerson, attorney for plaintiffs. Office and P. O. address, 99 Nassau St., N. Y. city. To —— ——, Esq., att'y for —: Due and timely service of a copy of the within is hereby admitted. Dated —— —, 188–. —— ——, att'y for —. U. S. circuit court. Filed Jul. 10, 1886, 12 m. Timothy Griffith, clerk.

40 *Bill of Exceptions.*

United States Circuit Court, Southern District of New York.

JOSEPH H. BERRY and Another, Plaintiffs,
against
JOSIAH H. DE WITT and Another, Defendants.

The issues in this case came on for trial at the October term of 1885 of this court before Honorable Nathaniel Shipman, district judge, sitting as circuit judge, and a jury, the parties being represented, respectively, by their attorneys and counsel, viz., Mr. P. Q. Eckerson and Mr. John E. Parsons, for the plaintiffs, and Mr. Henry C. De Witt, Mr. H. E. Tremain, and Mr. M. W. Tyler, for the defendants.

In the course of said trial said counsel for the defendants did take and allege sundry exceptions to the rulings of the said court in

admitting and excluding testimony, and to its charge to the jury, and to the refusal of the court to give such instructions to the jury then and there prayed for, which said exceptions are hereinafter severally set forth.

On the trial of said issues as aforesaid the following are substantially the proceedings that occurred which relate to the exceptions hereinafter specified:

41 To maintain the issues on the part of the plaintiffs ALFRED HOOPER was called and sworn and examined as a witness for the plaintiffs; on his examination-in-chief he testified:

Plaintiffs, under the firm name of "Berry Brothers," are partners carrying on business in Detroit, Michigan, having the witness for manager for their New York branch. Plaintiffs' business was manufacturers of varnish and japan drier, with factory in Detroit and branches in all principal cities. They have been engaged in the manufacture of articles of this description since 1858 extensively, the most so of anybody; their goods are used all throughout the United States and abroad.

The first time I saw Mr. Josiah H. De Witt (the principal defendant) was the day I made the contract with him for the merchandise in suit in this action; this was at his factory in Brooklyn.

For two or three years prior to that time the plaintiffs had been, through me, selling japan and varnish to the De Witt Wire Cloth Company, an establishment having their factory at Belleville and an office in John street, New York.

This (referring to the contract in suit) is the paper which was signed by myself and Mr. De Witt on that day. I signed "Berry Brothers, per A. Hooper, manager." After the signing of the paper Mr. De Witt had it copied in his letter book, and gave me a transcript, which I have here. The following is the paper:

42 A.

De Witts' Wire Window-Screen Cloth Manufactory. Office & factory, 1209 and 1211 De Kalb Ave. J. H. De Witt, J. H. De Witt, Jr., proprietors.

BROOKLYN, N. Y., *June 24th*, 1881.

We hereby agree to deliver to Messrs. J. H. De Witt & Son, at their factory in Brooklyn, in N. Y., eighty (80) barrels of japan and twenty (20) barrels of varnish within one year from date, these goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered.

Turpentine copal varnish, at 65c. per gallon.
Turpentine japan dryer, at 55c. " "

Each shipment to consist of eight (8) barrels japan and two (2) barrels varnish, to be made once a month, commencing September next.

Terms on each shipment, six months, without interest.

BERRY BROTHERS,
Per A. HOOPER, *Manager.*

We hereby accept the above proposition.

J. H. DE WITT & SON.

Brooklyn, June 24th, '81.

Q. Reference is made in this contract to sample barrels delivered; do you know about those sample barrels?

A. Yes, sir; they were sold by a salesman that I had at that time working for me here, and I borrowed them of the De Witt Wire Cloth Company. I sold them to that company and they were
43 shipped to them from Detroit, by Berry Brothers, from their factory there.

By defendants' counsel:

Q. Are you testifying of your own knowledge that these barrels were shipped from Detroit and you were in New York?

A. Yes, sir.

The witness then identified the bills of the goods in question showing the unpaid account, and said there were delivered under the contract, prior to the first charge in this account and between November 1st, 1881, and June, 1882, for which payment has not been made, viz: November 9th, 10 barrels of T. japan, at 55 cents a gallon, $270.88; November 30th, 10 barrels T. japan, at 55 cents, $277.20; January 9th, 1882, 8 barrels of T. japan, at 55 cents, and 2 barrels of T. copal, at 65 cents, $288.93; February 17th, 1882, 8 barrels of T. japan, at 55 cents, 2 barrels of T. copal, at 65 cents, $284.28; March 15th, 8 barrels of T. japan, at 55 cents, and 1 barrel of T. copal, at 65 cents—amount, $248.08; April 29th, 4 barrels of T. japan, at 55 cents, and 3 barrels of T. copal, at 65—amount, $208.76; May 14th, 4 barrels of T. japan, at 55—amount, $111.38; total, $1,687.51.

Q. What does T. mean?

A. It stands for turpentine. These goods came from Berry Brothers' factory, in Detroit, in all cases, some days before the delivery that I made.

Q. During this same period between 1st November, 1881, and June 1st, 1882, were you also making deliveries of articles purporting to be turpentine japan and turpentine copal to the De Witt Wire Cloth Company?

A. All that time. What I delivered all came from Berry Brothers' factory, in Detroit, but we shipped them in large quanti-
44 ties in car-loads, and then a good many of them were shipped direct from the factory without coming to me; they went to their factory at Belleville.

PLAINTIFFS' COUNSEL: I want to show that a lot of barrels came here, and that some were sent to the wire-cloth company and some to the defendants, and that there was no selection made. Presently I will ask the jury to say whether under those circumstances one shipment could have been of one kind, and of another kind to another.

The WITNESS: That was the fact.

Q. That they were sent indifferently?
A. Yes, sir; no selection was made.

Cross-examined:

Before this interview of June 24th two barrels had been delivered, I think in May. I got them from the De Witt Wire-Cloth Company, and shipped them from the John- street place. One barrel was turpentine japan and the other was turpentine copal. When we had this talk on June 24th they had then received these two barrels, if my memory serves me, a little over a month.

Q. Did Mr. De Witt say that they had worked them up into goods yet?

A. I understood him so—that he had tested them and was satisfied and wanted to make a contract for those goods.

Q. Had the goods gone out?

A. What goods?

Q. The goods he made as the result of those two barrels.

A. I don't know anything about that.

Q. You knew what Mr. De Witt wanted them for, didn't you?

A. He told me to use in his business.

45 Q. You knew what his business was?

A. The same as the other company, so he told me.

Q. Describe that business.

A. The manufacture of green wire cloth for mosquito netting.

Q. And this japan and this varnish was to be used in painting wire cloth?

A. Not to paint with; to mix with the paint to put it on.

Q. What else occurred on that day?

A. The contract was made and signed. He said he wanted to make a contract for a hundred barrels more, like those two barrels. I told him they could have them; named a price; he had not been buying of me up to that time.

Q. Is that all you remember that was said?

A. We had quite a long conversation. I sold the goods to Mr. De Witt with a great deal shorter conversation than it usually takes to sell. He wanted the goods and he wrote me a postal card to come over and take his order.

Q. Was that before he had the two barrels?

A. After he had the two barrels.

Q. What was the conversation you did have?

Objected to by plaintiffs' counsel.

The COURT: What is the object?

DEFENDANTS' COUNSEL: The object is to show the entire transaction—that this was not a mere sale of goods that was then completed. This, as the paper itself shows, was an executory contract for goods to be delivered at a certain future time and they were to be used in a manufacture that was perfectly well known to the plaintiffs,

46 to the vendors. We want to show all of their knowledge upon that subject, and the entire occurrence between Mr. Hooper and Mr. De Witt is competent in that respect. I did not

suppose there would be any conflict of testimony between Mr. Hooper and Mr. De Witt as to what occurred upon that question, and I did not suppose there would be any objection; but whether there be or not it is perfectly competent, relevant, and material. The entire contract was not reduced to writing. There were other things in the contract which the jury will have to pass upon to ascertain whether they were complied with or not. The knowledge on the part of the contracting parties as to what was meant by these terms is one of the things that will have to be ascertained. * * * Our proposition is that the law implies that when a contract to be performed at a future times designates the goods, the goods shall be merchantable and of the character described, and fit goods for the purpose of the manufacture for which they were designed and for which the seller knew they were designed. An executory contract of sale always carries obligation on the part of the vendor that the article to be delivered shall be, first, at least saleable, and, second, at least of a merchantable quality of goodness. And there is the further obligation that when it is designed to be used in a process of manufacture it shall be reasonably fit for the manufacture for which it is designed if the seller at that time knows that it was designed for that purpose.

We desire to show by that interview between Mr. Hooper and Mr. De Witt that the plaintiffs had full and complete knowl-
47 edge of all the purposes for which these articles were purchased. It is for the purpose of showing that and the collateral circumstances attending the making of this executory contract and the relation of the parties to do it that we ask Mr. Hooper what occurred on that occasion.

The COURT: You can make your inquiry as to whether there was any declaration made at that time as to the purpose for which the japan and copal were intended.

Q. I want to know what was said by Mr. De Witt to you at that time about these goods.

The COURT: Upon that subject.

A. Mr. De Witt told me that he wanted to buy those goods and use them for the same purpose the other company used them. He asked me if I sold the other company and I told him I did in large quantities, and that they were the only company I sold those goods to; they were the only company I knew in my territory in that business—the De Witt Wire Cloth Company. I don't think he said anything about the way they used them.

Q. Did he say anything about the way he was going to use them?

A. No, sir; not to my recollection. I didn't think he said anything about it; he gave me to understand he was in the same business as the other company and wanted the same goods. I was there an hour and a half; most of the time Mr. De Witt was telling me his history with the old company. He did not explain to me how he used the dryer or how the old company used it. I do not remember that he explained to me at all as to how their goods were mixed up to be used.

Q. Did you say anything to him on that subject?

A. I did not.

48 Q. Did he at that time tell you that any of the goods that were the products of those two barrels had gone into the market?

A. No, sir; he did not say anything on that subject, that I remember.

Q. Did he say anything to you about turpentine—anything about turpentine at all?

Objected to by plaintiffs' counsel.

DEFENDANTS' COUNSEL: We shall show that this contract was entered into on the part of Berry Brothers with full knowledge that an essential part of the contract was the presence of the turpentine in the dryer and in the japan for the purpose of mixing it in the paint to be used in painting wire cloth; that without the presence of the turpentine the article was absolutely valueless to the defendants; that Mr. Hooper knew that the purpose of this transaction was to get a dryer, and that the use of the japan and of the varnish was for the purpose of having it operate as a dryer because of the presence of the turpentine in it.

The COURT: You can ask whether there was anything said about turpentine at all in connection with the uses to which the article was to be applied (to which ruling, so far as it excluded the previous question, defendants' counsel excepted).

By the court:

Q. Was there anything said by Mr. De Witt in that interview in regard to turpentine in connection with the use to which the turpentine was to be applied?

A. No, sir; not as to what use it was to be applied to. He asked for turpentine copal and turpentine japan, the same as the other company got, and I sold it to him.

49 By defendants' counsel:

Q. Didn't you say anything about it?

A. About turpentine? Not that I remember. Mr. De Witt asked me this question, as to how we could afford to come to New York and sell varnish, being a Western house, and I told him we bought raw material——

Plaintiffs' counsel objecting.

By defendants' counsel:

Q. Did you say anything to Mr. De Witt at that time about furnishing a turpentine article for the uses for which he wanted it, and did you make any statements in reference to your ability to furnish him a turpentine article for that purpose; and, if so, what?

Plaintiffs' counsel objected to this as immaterial and irrelevant and for the obvious purpose of trying to get defendants out of their contract.

The court excluded the question, and defendants' counsel duly excepted.

The witness then identified letters between the parties.

DEFENDANTS' EXHIBIT "A."

Berry Brothers, varnish manufacturers, No. 96 John street. Factory, Detroit, Mich. Established 1858. Alfred Hooper, manager.

NEW YORK, *Nov. 5th*, 1881.

Messrs. J. H. De Witt and Son, Brooklyn, N. Y.

GENTLEMEN: In accordance with your favor of the 3rd, we forward you to-day, as requested, ten (10) barrels "N. C. Japan F,"
50 and note your instructions to leave out the "copal" from next month's shipment.

We are unloading a car of linseed oil now, both raw and boiled, and renew our offer for delivery, on Monday, at 60 and 63c. for what you want. We anticipate an early and sharp advance in the price of oil in sympathy with a like movement that has just taken place in seed, and we are daily refusing large orders at present prices for delivery in Nov. and Dec'r. If you think we are correct, would it not be wise to place your orders to-day for what you will use in the next 60 days? Awaiting reply,

Very truly, A. HOOPER, *Manager.*

DEFENDANTS' EXHIBIT "B."

Berry Brothers, varnish manufacturers, New York office & warehouse, 96 John St. Office & factory, Detroit, Mich. Established 1858.

NEW YORK, *M'ch* 17, 1882.

Messrs. J. H. De Witt & Son, Brooklyn, N. Y.

GENTLEMEN: Owing to an unfortunate blunder on the part of our shipping clerk we sent you in your shipment of the 15th inst. 1 bbl. not intended for you.

If you will kindly have your team return same to us and we will give him bbl. copal, charging expressage to us.

With regret for the error,

Yours truly, BERRY BROTHERS.

N.

51 DEFENDANTS' EXHIBIT "C."

Berry Brothers, varnish manufacturers, No. 96 John street. Factory, Detroit. Cable address, Berrybroth, New York. Alfred Hooper, manager. Established 1858.

NEW YORK, *May 1st*, 1882.

Messrs. J. H. De Witt and Son, Brooklyn, N. Y.

GENTLEMEN: Replying to your favor of the 29th inst. we would say that the varnish and japan that we have been sending you is

exactly as agreed—the very same the De W. W. C. Co. use—and turpentine goods we have delivered this Co., some (400 bbls.), on this year's contract, and they have not made any complaint whatever of it.

The only way we can account for your trouble is that you have put in too much japan and consequently dried the paint too hard. Our "japan dryer" is, doubtless, a stronger article than what you have used last year, or the paint may not be pure or as good as usual. There is nothing wrong with our goods, we are sure.

Your goods should have gone out Saturday, but our team got delayed until this a. m.

Yours truly, ALFRED HOOPER, *Manager.*

52 DEFENDANTS' EXHIBIT "D."

Berry Brothers, varnish manufacturers, No. 96 John street. Factory, Detroit. Established 1858. Cable address, Berrybroth, New York. Alfred Hooper, manager.

NEW YORK, *May 22nd*, 1882.

Messrs. J. H. De Witt and Son, 1209 De Kalb Ave., B'klyn, N. Y.

GENTLEMEN: Replying to your favor of the 11th and 18th inst. we would say that you are correct as to our having credited you with the freight amount, $13.60, twice, and we are obliged to you for calling our attention to it. We have also, in accordance with your request, duly countermanded all our future orders on the factory for varnish and japan for your use; so if you require any later please give us plenty of notice, as it takes from ten days to two weeks to get here.

All the goods sent you have been exactly as contracted for and precisely like those furnished the De Witt W. C. Co. here; in fact, the same that you got we borrowed from them. They also tell us that they have not had a single complaint this season of their goods or the paint chipping off, as you say yours do. We notice you buy a much larger proportion of japan to the varnish than they do, which makes us think we are correct in our previous suggestion that
53 you use too much proportionally.

Yours truly, A. HOOPER, *Manager.*

DEFENDANTS' EXHIBIT "E."

Berry Brothers, varnish manufacturers; Philadelphia branch, 59 North Front St.; Baltimore branch, 100 W. Lombard St.; Boston branch, 141 Milk St.; New York branch, 96 John St.; Chicago branch, 236 Lake St.; St. Louis branch, 505 North 3rd St.; Cincinnati branch, 60 Main St.; Rochester branch, 116 Front St. Established 1858.

DETROIT, *June 13th*, 1882.

Messrs. J. H. De Witt & Son, Brooklyn.

GENTLEMEN: We are in receipt of yours of 9th inst. and regret to know that you are dissatisfied with the goods we have been selling

you. We cannot, however, feel that we are responsible for your paint chipping off your cloth. We sold the japan as a dryer, and when used as such it gives excellent satisfaction. We think the trouble is you have not used oil enough. No paint mixed up entirely or nearly so with japan and varnish will stand much knocking about on such goods as yours after the paint becomes quite hard. We think the thickness of the paint would have much to do with its coming off; a thin coating would not come off so easily as a thick. As to the japan not being as represented, we have to say that as far as we know it is just what we agreed to send. It is one of our regular grades of japan, which we sell large quantities with perfect satisfaction
54 to our customers. Mr. Hooper, our manager in New York, has not yet written us of your complaint, and we do not know what representations he made in selling the goods. He could not, however, have represented them as being made in a certain way, as he does not know how we manufacture our japan. If you had stated how you wanted it made we should have followed your instructions or refused the orders. We cannot say more now, not having heard from Mr. Hooper. We will write him at once, and anything which is reasonable and right in the matter we will do. Sincerely regretting that anything should arise to disturb our heretofore pleasant intercourse, we are

Yours truly, BERRY BROTHERS.

By defendants' counsel:

Q. In these letters what does the T. stand for in connection with the words turpentine and varnish?

A. Turpentine. Wherever you find the letter T in these letters, that is the meaning, I am sure; and the same on the bill. The two barrels were sent before the conversation of June 24. We didn't have but one conversation about that time. The next delivery was, I think, August 15.

Q. You sent those two barrels on your own motion to him as an invitation to trade?

A. No, sir; he ordered them; I had the conversation with the salesman that sold them, not with the defendant. It is probable I had a written order for them; if so, I will produce it. The salesman's name was William T. Sunley; I don't know where he is now. I can't tell how long those barrels had been manufactured.
55 I borrowed them from J. G. De Witt, of the De Witt Wire Cloth Company. I shipped them; don't know from what lot; they might have been manufactured by the Berry Brothers one month or three months before they were delivered. The De Witt Wire Cloth Company were getting out of goods and ordering from me all the time, and they wouldn't keep goods on hand a year, but might three months.

The witness then identified bills, produced by the defendants, covering the various deliveries he had mentioned, which bills were read in evidence. All the goods were, upon these bills, designated as (blank) barrels of "T. japan" and (blank) barrels of "T. copal," or "T. copal varnish."

Q. All these goods were the same, were they; it was all the same japan, wasn't it, that was delivered?

A. Yes, sir.

Q. And it was all the same varnish or copal?

A. Yes, sir, as far as the brands go—as far as I know about it.

Q. Don't you know?

A. I say they were all the same brands of goods, and I sold them for the same.

Q. Had you delivered the De Witt Wire Cloth Company any goods prior to June 24, when this contract was made?

A. Yes, sir.

Q. Were those the same goods which you subsequently delivered to the defendants here?

A. Yes, sir; the same commercial article.

Q. And did you continue to deliver the same commercial article to the De Witt Wire Cloth Company for six months after June, 1881?

A. We did; and for two or three months prior.

Q. You made a contract, had you?

56 A. Yes, sir; I think it was for four hundred barrels; it was their season's supply and it may have been 500 or 600.

Q. Did you tell that to the defendant De Witt?

A. I did; I presume I did.

Q. You had made the contract before you made this one in suit?

A. Yes, and were delivering under it. We had delivered a great many barrels—200 or 300. They got several hundred barrels after that. Deliveries to defendants ceased, I should judge, about December, 1881. They had several car-loads in October, November, and December; 50 barrels in a car-load.

Q. When did the goods first come back from the De Witt Wire Cloth Company?

A. There never came back any.

Q. Did Berry Brothers receive any?

A. I believe they did.

Q. Isn't it true that a car-load came back?

A. It may be. I believe the De Witt Wire Cloth Company exchanged a good many goods after that—exchanged for other goods. We sent out other goods and they sent back a certain number of barrels.

Q. Did you get a complaint from Mr. De Witt, the defendant?

A. Yes, sir; he wrote; the first knowledge I had was his letter; I should say April or May, 1882. Prior to receiving that letter I had heard no dissatisfaction from the defendants.

Q. Had you heard any dissatisfaction from the De Witt Wire Cloth Company?

A. No, sir.

Q. Didn't you know of the return or the exchange, as you say, of the goods?

A. Yes, sir; I knew of that transaction. I don't know of anything about that except the fact that they were returned and we sent them other goods.

57 Redirect by plaintiffs' counsel:

Q. As I understand, you testified that the one article was known as turpentine japan and the other as turpentine copal; is that so?

A. Yes, sir; I so testified.

Q. Are there several grades of these articles?

A. Yes, sir.

Q. All known by well-understood commercial designations?

A. Yes, sir.

Q. How many grades of japan?

A. We make several; three leading grades known by the names "extra coach japan;" "No. 1 turpentine japan," and "turpentine japan."

Q. This being the lowest grade?

A. Yes, sir.

Q. How is it with the varnish—how many grades?

—. There are more. There is the "pure turpentine copal" and "extra turpentine copal" and "No. 1 copal" and No. 1 light and then "turpentine copal."

—. This that was sent to the defendant is the lowest grade?

A. Yes, sir; but it was the same that was furnished to the De Witt Wire Cloth Company before and after the contract.

Q. How are the barrels containing the japan and varnish marked by Berry Brothers so as to designate them?

DEFENDANTS' COUNSEL: We object to that as immaterial how plaintiffs marked their goods. We have no objection to the witness testifying as to what the two designations may be or in respect to the commercial usages of the trade in these goods, but we do object to the specific usages of Berry Brothers with a view of influencing the jury as to any actual trade designations. We object to
58 the question as immaterial, irrelevant, and incompetent.

The court overruled the objection, and defendants' counsel duly excepted.

A. The barrels were painted red—the bodies—blue, the heads, and marked in large letters "T copal" and "T japan," from "Berry Brothers, Detroit," in stencil: and so with the two sample barrels. The goods were all packed in the same way, contained in barrels marked "T copal" and "T. japan."

Mr. De Witt never complained to me that I had not delivered to him the same kind of japan and the same kind of varnish that the wire-oloth company had. There was nothing ever said by Mr. De Witt on the subject that the goods did not conform to the sample. Mr. De Witt did not tell me how he proposed to use these goods, and I did not have any knowledge upon the subject. The two sample barrels were delivered to the defendants on or before June 11, 1881. Letter of defendants to plaintiffs:

PLAINTIFFS' EXHIBIT "8."

De Witt's Wire Window-Screen Cloth Manufactory. Office and factory, 1209 & 1211 De Kalb Ave. J. H. De Witt, J. H. De Witt, Jr., proprietors.

BROOKLYN, N. Y., *June 14th*, 1881.

Mess. Berry Brothers, 96 John St., New York city.

GENTLEMEN: Your favor of the 13th at hand and contents
59 carefully noted. We have received the two bbls. and will give your goods a trial within a few days.

Yours truly, J. H. DE WITT & SON.
BUTMAN.

The two sample barrels referred to in this letter are the two sample barrels upon which the contract was made. Two weeks after defendants made that complaint, April 29th, 1882, they wrote this letter dated May 12th, 1882, ordering five more barrels of japan:

PLAINTIFFS' EXHIBIT No. "9."

De Witt's Wire Window-Screen Cloth Company. Office and factory, 1209 & 1211 De Kalb Ave. J. H. De Witt, J. H. De Witt, Jr., proprietors.

BROOKLYN, N. Y., *May 12th*, 1882.

Mess. Berry Brothers, New York city.

GENTLEMEN: Please send us early next week five (5) bbls. of japan. Do not send any more varnish until you hear from us.

Yours truly, J. H. DE WITT & SON.
BUTMAN.

Long after the defendants had received the sample barrels I called upon them in response to a postal card (this is the
60 postal card), dated June 22, 1881:

PLAINTIFFS' EXHIBIT No. "10."

Directed: Mess. Berry Brothers, 96 John St., New York city.

BROOKLYN, *June 22d*, 1881.

Mess. Berry Brothers, 96 John St., New York city.

GENTLEMEN: If the writer of letter of June 13th will call at our office on Friday of this week, between 10 & 2 o'c., he may have an interview with Mr. De Witt regarding japan, &c.

Yours truly, J. H. DE WITT & SON.

Recross by defendants' counsel:

I have no copy of the contract between Berry Brothers and the De Witt Wire Cloth Company. I saw it this morning in the hands of Mr. J. G. De Witt.

Q. (A paper produced under a subpœna to Mr. J. G. De Witt is handed to the witness Hooper.) Is that the contract to which you referred in the interview between Mr. De Witt and yourself on or about June 24, 1880?

PLAINTIFFS' COUNSEL: He has not said that he referred to any contract in that interview.

DEFENDANTS' COUNSEL: We understood Mr. Hooper to testify that he told Mr. De Witt that he had made a contract with the De Witt Wire Cloth Company.

The WITNESS: You are mistaken; I did not testify that.

Mr. PARSONS: That paper, I understand, is the only pending contract with the De Witt Wire Cloth Company. If that is what you desire to have admitted, it will be admitted.

61 (By defendants' counsel:)

Q. Is that the fact, Mr. Hooper?

A. That is the only contract I ever made with them in writing. That is dated August 28, 1880, the season to close not later than November 1st, 1881, and that contract was then in existence.

Q. Did you inform Mr. De Witt of the existence of a contract with the De Witt Wire Cloth Company?

A. I think not; I am sure of it.

The contract was marked for identification "S," and appears in evidence at a later stage of the case.

HERBERT WALKER, being called and sworn and examined as a witness for the plaintiffs, testified:

I am superintendent of the plaintiffs' factory at Detroit. I have heard the testimony of Mr. Hooper as to certain deliveries of japan and varnish to the De Witt Wire Cloth Company and the two barrels borrowed from the company and furnished to Messrs. De Witt & Son as sample barrels; and during all the time of the manufacture of the varnish and japan thus testified to I was superintendent of Berry Bros.; I had been for some time before. My duties were a general superintendent of the works and of the manufacture of all articles there, and the work in the manufacture of all articles there is done under my direction.

I have personal knowledge as to the japan and varnish packed in the barrels that were sent to the De Witt Wire Cloth Company, and also to the defendants. In and prior to June, 1881, we were sending to the wire-cloth company articles sold as "turpentine
62 copal varnish" and "turpentine japan drier." The articles that were sent to the De Witt Wire Cloth Company and to the defendants were precisely alike.

Cross-examination by defendants' counsel:

The goods that were billed to the De Witt Wire Cloth Company and to the defendants as turpentine japan drier were precisely alike; so with the turpentine copal varnish.

Q. What knowledge have you as to what is turpentine copal varnish?

A. Turpentine copal varnish would be a varnish in which turpentine is one of the ingredients.

Q. What knowledge have you as to what is turpentine copal varnish—what are your sources of knowledge?

A. I have had some practical experience in the manufacture of varnishes for some years with Berry Brothers; nowhere else; I think about seven years. I never saw turpentine copal varnish made anywhere else. I have bought it and sold it myself, but not in large quantities. My business was not as a buyer or seller for the firm. I have to state what ingredients I would use in it. I am not a practical chemist. I fix the ingredients, I think, in all cases for the japan drier and for the varnish; learned how from general knowledge of the business which I had acquired while with the plaintiffs. I worked under the direction of Mr. Berry, and had charge of the shipping and the marking before I was charged with fixing the proportions, which I was occupied in fixing probably a year before June, 1881.

Q. Was all your varnish made exactly alike?

A. No, sir.

63 Q. Was all the turpentine japan drier made exactly alike?

A. No, sir. I never personally made any contracts with large wholesale houses for quantities of turpentine copal varnish nor for turpentine japan drier. It wasn't part of my duty as superintendent to make such contracts. I didn't have anything to do with that. It was my business to see that the varnish was properly made, and had general direction of the workings of the factory. I had a melter under me who acted under my direction.

Q. Is it your experience that every batch of the drier runs alike?

A. Well, nearly so; yes, sir; anything that is made for the same purpose. It does not vary to any very great extent. That has been my experience.

The plaintiffs thereupon rested, and defendants' counsel, after opening the case for the defendants in behalf of their counter-claim, called the following witnesses:

HENRY BUTMAN, a witness, being called and sworn and examined on the part of the defendants, testified on his examination-in-chief as follows:

I reside at Evanstown, Illinois, and do business in Chicago; am the western agent for the Clinton Wire Cloth Company and know of Berry Brothers, and know the defendant and Mr. Hooper. I was in the defendants' employ from October, 1880, until May, 1883, since which time I have not been with them. I am now with a rival concern. Was present at a conversation between Mr. Hooper and Mr. De Witt in June, 1881, when this paper (the contract)

64 was signed. Mr. De Witt said that this article that he was to use was to be mixed with paint in painting wire cloth and he wanted a good article.

Q. Now, will you please tell what was said by Mr. De Witt to Mr. Hooper in respect to the use of this article and the method of its use by Mr. De Witt? State all that was said on the subject, to the best of your recollection.

A. Mr. De Witt told Mr. Hooper that his process of painting was about the same as or the same as the De Witt Wire Cloth Company's process; that his looms were the same; that his painting machine was the same thing.

Q. What did Mr. De Witt say to Mr. Hooper about the necessity of turpentine in the article for his particular use?

A. He told Mr. Hooper that he wanted turpentine goods; that he must have it; told him it would not do to have benzine goods—that is, goods with too much benzine in. Mr. De Witt expected to have what was considered a commercial turpentine article.

Q. What did Mr. Hooper say to that?

A. Mr. Hooper said that they had the facilities for turning out——

Objected — by plaintiffs' counsel, who claimed that this did not come within the question allowed by the court.

By the court:

Q. State, please, what Mr. Hooper said in regard to his knowledge of the uses to which these goods were to be applied by the defendants.

A. Mr. Hooper said that he thought he knew just what he wanted; that he was supplying the De Witt Wire Cloth Company
65 and satisfactorily, and Mr. De Witt said, Have I a right to speak of that? Mr. De Witt replied that if he was supplying them satisfactorily that is all he expected him to do; and then some reference was made to the machinery and one thing or another, and to the manner of making paint. Mr. De Witt told Mr. Hooper that his looms were the same as the De Witt Wire Cloth Company's looms; that his painting machine was the same, the process of painting was the same, and the weaving was the same, and that brought about the other conversation that I have just stated.

By defendants' counsel:

Q. Did Mr. Hooper say that he knew what the De Witt Wire Cloth Company were making—did he say he knew how the De Witt Wire Cloth Company were using it?

A. Yes, sir; he said that.

By a juror:

Q. Do you know about the grade of varnishes for this description of work—whether they are common grades or better grades or what?

A. No, sir; I should think the grade that was used was a pretty fair grade of varnish that they had to use, both varnish and japan. They have to use a pretty good grade in that process of painting. Later on I took sample of these goods to the chemist. It may have been in the latter part of 1882 or the first part of 1883; I have forgotten. I was salesman and book-keeper and general man. I took Mr. De Witt's place when he was away. I took this sample to the chemist to ascertain what was in it and what it was made of. I saw

the samples drawn by Mr. De Witt and had them labelled and took them to Mr. Arvine.

66 I have seen the process in the De Witt factory of the use of drier in mixing paint.

The paint, after it is all mixed, is put into a trough, and there are rollers above this trough, over which the wire cloth passes, and down into the trough and then upon other rollers and then went through the vat; I think the machine is 120 feet long; and then a wire comes back and is rolled up on a reel—probably 600 feet is put in—and that is cut in two parts; then the cloth is allowed to stand in this roll of 300 feet on the reel; it is woven 600 feet long and then cut to 300 feet; it is allowed to stand in the 300-feet roll sometimes two or three days, until it is dry, and then, after painting a certain lot, we commence and go all over it again. I don't know whether there is any definite time as to how long; it should stand to dry, and then it is passed through this painting machinery on the second coat. It goes through the same trough of paint and then it is rolled up on a reel and cut off every 100 feet; then it is wired on the reel and then it is taken off and set aside afterwards when it is considered dry; that is about all. After this it is wrapped around a plug of wood into a roll, which is covered with paper, the paper being cut at the ends of the rolls with the shears and tucked in and then plugged. During the season of 1881 and 1882 we commenced shipping the manufactured wire as early as December. We commenced using the Berry stuff, I think, in August. After we sold to the jobber the jobber would sell to the retail trade, and the con-

67 sumer bought the rolls from the retail trade, and then they would be opened. The manufacture of wire-screen doors commenced as early as the 1st of September, but the ordinary jobbing trade would not consume the cloth until about May. We produced during the season of 1881 and 1882 about four million square feet of wire cloth; we sold it all that year. Of the product so sold we took back from Ducharme, Fletcher & Co., of Detroit, between two and three hundred rolls the next year. I know the defect which caused the cloth to be returned—the paint came off the cloth. The buyer of that firm went with me into the stock-room and we took down several rolls, and at my suggestion opened the ends of paper and knocked it on the floor, and the paint came off on the floor—so much so that I was convinced that it was proper to return the goods. This was in the fall of 1882. We also received complaints from Sargent & Co., of New York; Rogers & Engle, of Dayton, Ohio, and, I think, the Wyeth Hardware Co., of St. Jo., Missouri. I also remember a lot of about fifteen or sixteen hundred rolls that were painted with the Berry stuff; it was unsaleable because the paint came off, and Mr. De Witt had a large tank made and filled with chemicals, and this cloth was plunged in, roll by roll, after being unrolled; and this took the paint all off. The firm of Morgan & Page also returned about five thousand square feet of these same Berry goods.

Q. Were you able to continue the sales of these customers who returned the goods?

Objected to by plaintiffs' counsel—first, because there is
68 no such item of damage claimed in the bill of particulars; secondly, because customers alone can tell whether it influenced them or not.

THE COURT: I do not think it is competent for him to testify that he lost custom.

To which ruling defendants' counsel duly excepted.

Upon being cross-examined by plaintiffs' counsel, the witness testified:

I went first to Messrs. De Witt & Son in October, 1880, and remained with them until May, 1883. Messrs. De Witt & Son used benzine on their rollers to clean their rollers, and a little of it might have gone into the paint in the use of it. I should think they bought a barrel a month for that purpose during the time that they were using the Berry varnish; they used adulterated paint. The De Witt Wire Cloth Company used the same process for painting and drying that De Witt & Son used. The De Witt Wire Cloth Co. gave up using this process when their machine burned up. By this process the time consumed in drying the paint was just as long as it took the wire cloth to be carried slowly 120 feet and back—about ten minutes, I should think. At the beginning of that ten minutes it went in covered with wet paint; it did not come out sufficiently dried to wrap at once, but we rolled it as soon as it came out, before it was thoroughly dried.

The drying was by heat applied through steam pipes. No others except the De Witt Wire Cloth Company and J. H. De Witt & Son use this process. Afterwards it has a second coat applied, and is
69 then immediately rolled into tight rolls. I took samples of the Berry japan to a chemist late in 1882, or early in 1883; I saw the samples drawn from the barrels.

On being redirectly examined by defendants' counsel, the witness said:

For house painting and painting wire cloth it is generally understood that strictly pure paint is not used; the effect of using benzine as a substitute for turpentine is to make the paint cake and rub off. There is not body enough to benzine and it would soon evaporate and leave nothing to hold the paint to the wire.

ALFRED E. OVERTON, being sworn, testified for defendants:

That he was general manager for Mr. Gregory, whose business was refining petroleum and dealer in spirits of turpentine; that he knew the market price during the year of 1881. In June, 1881, the price was 38 to 44 cents per gal.; in July, 44 to 42 cts. per gal.; August, 42 to 52 cts. per gal.; September, 52 to 55½ cts. per gal.; October, 55 to 56 cts. per gal.; November, 56 to 58 cts. per gal.; December, 58 cts. per gal.; January, 1882, 57 to 56 cts. per gal.; February, 1882, 55 to 54 cts. per gal.; March, 54 to 59 cts. per gal.; April, 60 to 67 cts. per gal.; May, 61 to 51 to 47 cts. per gallon.

JOHN BAILEY, being duly sworn, testified for defendants:

I am salesman for C. T. Raynolds & Co.; have been with them twenty-nine years. They are manufacturers and dealers in paints, varnishes, and colors. I am familiar with the commercial designations of articles in that line of products, and have had forty-five years' experience. Turpentine japan drier and turpentine
70 copal varnish are trade terms, and describe well-known articles in the trade. A turpentine japan drier should be made of gums, linseed oil, red lead, litharge, and spirits of turpentine. An article that contained as one of its constituent ingredients a substantial proportion of benzine would not pass commercially among wholesale dealers as a turpentine japan drier; it would not be accepted if it contained any benzine. There is in the trade an article that goes under the name of benzine japan drier, and also an article that goes under the name of turpentine and benzine drier. A turpentine japan drier should be made of turpentine; a benzine japan drier, should be made wholly of benzine; a turpine and benzine drier or a T. and B. drier is made by using half turpentine and half benzine, or any other proportion of either.

Being cross-examined by plaintiffs' counsel:

C. T. Raynolds & Co. sell these articles under these names. I am not conversant with other houses. When I speak about terms used in the trade I mean nothing more than terms used by C. T. Raynolds & Co. All I know is what they use in their business.

I have nothing to do with the process of manufacture in the establishment of C. T. Raynolds & Co.; have not for fifteen years. Benzine has been used since 1860 or 1861.

No person in the trade would accept an article having any benzine in it as a turpentine japan drier. If I should offer a person a turpentine and benzine japan or a turpentine and benzine varnish I suppose they would get it. I should sell it and get a price
71 accordingly. If I sold a turpentine japan I would get a price accordingly for that and they would get the article, or if I sold a benzine japan they would get a price accordingly and get the article.

Q. I want you to mention a name of a single person who ever objected to receive, after a purchase of an article called in the purchase a turpentine japan or turpentine japan drier, an article which had some benzine in it.

Defendants' counsel objected that the question assumes as a fact that this witness has had an experience under a contract calling for a delivery of turpentine japan drier where he has delivered a benzine article, and that such assumption is not warranted by his testimony; also that the question should be excluded as immaterial, irrelevant, and incompetent; objection overruled and defendants' counsel duly excepted.

A. Not as far as I am personally concerned. The more prominent makers of varnish and japan are Valentine & Co., Murphy & Co., Smiths, of Newark, and F. W. Devoe & Co. We bill goods as

turpentine japan every day in the year. Personally, I know nothing of the manufacture of these goods for the few years past. Our manufactory is at Bergenport, New Jersey.

On being redirectly examined by defendants counsel' he said:

I never knew an article containing benzine that was in fact delivered under the name of turpentine japan drier by C. T. Renolds & Co.

72 JOHN S. PAGE, being duly sworn, testifies for defendants as follows:

I am a member of the firm of F. W. Devoe & Co., whose business is paints, oils, and varnishes; have been familiar with that business for the last twenty years; principal houses in this city in the varnish trade are Clarence Brooks & Co., C. F. Reynolds & Co., John W. Masury & Sons, Meyer & Loeverstone, W. D. Chase, Harrington & Co., Murphy & Co., Valentine & Co., and others. The terms turpentine japan drier and turpentine copal varnish are commercial terms, and in trade describe a well-defined article or class of articles. A turpentine japan is known as a japan composed of turpentine and japan together. It should be composed of oil, turpentine, gum, and a drier. In the trade turpentine means turpentine. Under no circumstances, according to my experience as a merchant, if a contract or order was made for a turpentine japan drier would it be accepted in the trade as filled by a delivery of an article containing benzine.

Being cross-examined by plaintiffs' counsel, he said:

F. W. Devoe & Co. used these terms, turpentine japan drier and turpentine copal varnish, or rather we reverse the words and say copal varnish turpentine.

There is nothing which has so large a variety of names; they all come out of one barrel, but we call them by different names.

SOLOMON D. CHASE, being duly sworn, testifies for defendants as follows:

73 Am a manufacturer and dealer in varnishes and japans—for ten years past for myself; during fifteen years previous to that with other parties. Am familiar with the use in trade and commerce of the terms turpentine japan drier and turpentine copal varnish. There is a commercial term generally known and recommended among paint merchants as turpentine japan drier, and another as turpentine copal varnish. The turpentine japan drier is composed of one-third linseed oil and gum and two-thirds spirits of turpentine, with the requisite driers. A japan drier having a large percentage of benzine in it would be commercially described as a benzine japan drier.

Being cross-examined by plaintiffs' counsel, he said:

I do not publish a trade list using the term benzine japan drier. I do not know of any house that does. I do not know of any other

house except my own which makes the article called turpentine japan drier, consisting of one-third oil and gum and two-thirds spirits of turpentine. I know nothing about other houses.

JAMES LANGMEYER, being duly sworn, testifies for defendants:

I am in the employ of Harrison Bros. & Co., manufacturers of white lead colors and chemicals; am familiar with japan driers and varnishes and the names under which they are bought and sold in commerce. The turpentine japan drier and turpentine copal varnish are commercial terms. A turpentine japan drier, as I understand it, must contain no benzine. A japan drier with a
74 large percentage of benzine in it would be commercially described as a benzine drier.

Being cross-examined by plaintiffs' counsel, he said:

Our house publishes a price-list. Those lists ordinarily describe, under designated names, the various articles sold. Our list does not use these terms, turpentine japan drier or benzine japan drier or turpentine copal varnish. I think Muller & Schumann publish a trade list with the terms turpentine japan drier and benzine japan drier upon it.

CHARLES H. K. SMITH, being duly sworn, testifies for defendants:

I am a painter, and previous to 1884 have been working for the De Witt Wire Cloth Company, from 1875, at Belleville, N. J. The machine work began in 1875, I should think. When we first began to paint we were making experiments. We endeavored to get something to dry within fifteen minutes while it was running fifty feet. We used this varnish. We got several kinds of varnish and endeavored to work with the varnish and use it in painting patent leather. In order to let it dry in such a time we made a varnish for that purpose; that answered very well, but I soon found it would not do to paint work with varnish altogether; it did not make a good job, so we tried all sorts of japans. When the machine was perfected our main dependence was a drying japan. We used very little varnish, just enough to make the cloth, when done, have a rounded appearance in coming out of the heated box. It flowed, and the varnish would make it a little glossy, something like japan work, but not quite. We tried at one time benzine japan
75 and also a benzine varnish furnished by Mr. Pratt's agent, but it did not work. We used some of this Berry varnish quite a while. They sent five barrels. There were several barrels of turpentine and one or two barrels of japan. I used it and reported on it that the varnish I could use, but if they wished to buy any more material from Berry Bros. they had better confine themselves to the varnish. The japan I could not handle; it was too thin. We did have a lot of paint come off that was put on probably in 1882. My opinion of benzine is that it is no good. I don't think it is good for anything but washing off paint and cleaning up paint stands; no good painter will use it for anything else.

On being cross-examined by plaintiffs' counsel he said:

I have used benzine more or less since the war. I know what it will do and know what it will not do in certain respects. Benzine is no drier at all; that is my idea of benzine for painting; it is not a drier; I have never made an ounce of varnish of japan. The De Witt Wire Cloth Co. began to use the Berry varnish probably ten years after 1877. When they were using Berry Bros. turpentine japan drier I applied my little test to it for benzine, but could not discover any. While I was with the De Witt Wire Cloth Co. I mixed the paint. I never added any benzine.

FREELING W. ARVINE, being duly sworn, testifies as follows:

I am an industrial chemist; have been engaged in that line for nineteen years; have charge of the Standard laboratory in this city.

76 For a couple of years I have worked on varnishes and japans and driers; have made it my business and profession to be thoroughly informed concerning the methods of manufacture of japan driers and varnishes and their constituent ingredients during that time; have made a good many analyses of japan driers and varnishes during that time. In the fall of 1882 Mr. De Witt called on me with his book-keeper or manager, Mr. Butman, and brought me a sample bottle marked, I believe, japan drier. I examined it for benzine especially, and made an analysis, and the result of that analysis was 42 per cent. of benzine, as nearly as I can state it now. I afterwards made an examination of the solid matter to satisfy myself as to whether it contained any gum and linseed oil. I found that it contained a very small amount of gum and a small percentage of linseed oil and about 10 per cent. of turpentine, I think. The solid portion, amounting to about 47 per cent., was principally rosin.

Q. What are the characteristics of a turpentine japan drier that are required for applying it for a paint to an article similar to that wire-screen cloth that is here in court?

To which plaintiffs' counsel objected that it was not material to the issue here.

The court sustained the objection and excluded the question.

To which defendants' counsel duly excepted, and asked the following questions:

Q. The constituent ingredients requisite to be present in a japan drier for the usual uses to which a japan drier is applied are what?

To which plaintiffs' counsel objected upon the same grounds as the last, and the court asked:

77 Does your question go any further than the element of benzine in the article?

Mr. TREMAIN: Yes, sir; it is intended to go further.

The COURT: Then I exclude it in so far as it is intended to go further than benzine.

To which ruling defendants' counsel duly excepted.

The witness, resuming, further testified:

Benzine evaporates at all temperatures; at 65 it evaporates rapidly. Turpentine also evaporates at all temperatures, but not so rapidly as benzine.

Q. Is resin a proper constituent in the commodity that is used for the purpose for which a japan drier is used?

To which plaintiffs' counsel objected, and the court sustained the objection; to which ruling defendants' counsel duly excepted.

Q. What would be the effect of an excessive quantity of resin in a turpentine japan drier in applying it to the uses for which it is ordinarily applied?

To which question plaintiffs' counsel objected, and the court excluded the same; to which ruling defendants' counsel duly excepted.

Q. Could the article you analyzed be used, in your opinion, with any paint by Mr. De Witt's process or the process of the De Witt Wire Cloth Co.?

To which question plaintiffs' counsel objected, and the court excluded the same, and defendants' counsel duly excepted to such ruling.

78 Being cross-examined by plaintiffs' counsel, he said:

As disclosing the portion of benzine within the article analyzed, I think you could reply, upon the analysis, within about one per cent. I have tried several processes.

And the witness then described the process tried in the case.

Q. As I understand you, you brought something to the surface which you call benzine?

A. Yes, sir; you did not understand me to say "something that I call benzine," because I have been manufacturing benzine a good many years, and I know.

Q. Did you not call it benzine?

A. I know it to be benzine.

Q. You called it benzine?

A. I was sure it was benzine.

JOHN A. ELMENDORF, being duly sworn, testifies for the defendants as follows:

I am a member of the firm of Edward Smith & Co., manufacturers of varnishes, japans, etc. I am familiar with the commercial designations used in the line of business. The term turpentine japan drier and the term turpentine copal varnish are commercial terms in use among merchants; they describe well-defined articles. A turpentine japan drier is a drier made of linseed oil and spirits of turpentine, with other ingredients that form the drier. A turpentine Japan drier with a large percentage of benzine in it would be commercially described as a turpentine and benzine drier.

79 Being cross-examined by plaintiffs' counsel, he said:

I knew personally one of the plaintiffs. I have seen the terms turpentine japan drier and turpentine copal varnish in trade lists; our own trade list contains them.

LEWIS H. WOOD, being duly sworn, testifies for defendants as follows:

I am a manufacturer of varnishes, japans, and driers; have been in the business for fifteen years. Turpentine japan drier and turpentine copal varnish are commercial names used in the trade. We sell turpentine japan for a good many purposes, but we don't suppose that by calling it turpentine japan or giving it the word "turpentine" that it means alone that it must contain turpentine and nothing else. We consider that where the greater per cent. of turpentine is used in a varnish or drier its name is given turpentine, and it is called a turpentine whether it is a japan or varnish. What it is commercially called is governed a good deal by the price. An article containinganything under half benzine would be called turpentine; over half would be called a union B. and T. T. japan is the turpentine. B. and T. is equal parts, half and half; and B. means all benzine—that is as I consider it.

Being cross-examined, he said:

If an article did not contain more than fifty per cent. of benzine it would be called turpentine.

Upon being redirectly examined by defendants' counsel he said:

80 50 per cent. of turpentine and 50 per cent. of benzine makes a union, or half and half, or a B. and T., as some call it. An article containing rosin 47 per cent., turpentine 6 per cent., benzine 38 per cent., and manganese 7 per cent., and the balance miscellaneous substances, would, in my opinion, be called a benzine drier.

R. OGDEN DOREMUS, being duly sworn, testifies for defendants as follows:

I have been a lecturer upon chemistry, professor in various colleges, from the College of Pharmacy to the College of the City of New York and Bellevue Medical College, since 1849. I also instruct the College of the City of New York specially, not only in general chemistry, but in commercial chemistry. I have frequently had occasion to make investigations of a chemical nature and to appear in court to testify concerning them.

Mr. De Witt brought me a sample and asked me to analyze it on September 18th, 1884, marked "Berry Bros.; turpentine japan drier;" sold to J. H. De Witt & Son, taken from a barrel marked 1881. The sample was in a bottle. The specific gravity of this drier at 60° Fahrenheit was 0.932. On distillation it yielded a liquid which I separated into two liquids, and one was turpentine to the extent of 6.33 per cent., the other was benzine, 38.02 per cent., making in all 44.35 per cent. of the liquid. The two together, the benzine and the

turpentine, had a specific gravity of .781. There was a residue of resin and some little oil and some little gum with it, amounting to 47.09 per cent.; oxide of manganese, 7.84 per cent. I compared this analysis with that made by Mr. Arvine. Mr. Arvine's analysis had a larger per cent. of benzine than I obtained.

81

Being cross-examined by plaintiffs' counsel, he said:

There is not the slightest difficulty in separating the turpentine from the benzine.

(And the witness then described the process, which was substantially the same as that described by Mr. Arvine.)

Resin is the residue originally distilled from turpentine. If commercial turpentine was distilled there would still be a small residue of resin—a very small quantity.

JOSIAH H. DE WITT, being duly sworn, testified on his own behalf:

I am a manufacturer of wire cloth, and have been in that business fully thirty years; was connected with the De Witt Wire Cloth Co. for two or three years after its foundation in 1876, and prior — that with G. De Witt & Brother. The De Witt Wire Cloth Co. and I used the same process until March, 1885, I having invented the machine and having a patent on it. By this process the wire cloth runs through a trough filled with paint and passes between felt rollers into a drying chamber artificially heated by steam. At the further end of each chamber it passes into the cold air, the chamber itself being heated to 140. This is the process that I used in 1881 and 1882. After the first coat of paint is applied the rolls stand four or five days and a second coat is applied; four or five days after that they are rolled up into tight rolls and wrapped in paper with the ends sealed up and put into the store-house. The product of our manufactory reached the consumers in 1881 and 1882—in April and July of 1882. A young man came to my manufactory from Berry Bros. to solicit an order from me for their varnish and drier.

82

By defendants' counsel:

Q. What did that young man say about that japan drier?

Objected to by plaintiffs' counsel; objection sustained and defendants' counsel duly excepted.

—. That young man said he would send Mr. Hooper, plaintiffs' agent, over to have a talk with me. Mr. Hooper came and I told him that when I was with the De Witt Wire Cloth Co. we had some of the Berry goods, which had not proved satisfactory. Mr. Hooper said they were now satisfying the De Witt Wire Cloth Co. with their japan; that they had experimented and the difficulties which had occurred before were overcome, and that he had contracted with

them for 400 barrels of japan and varnish. I said to him I wanted turpentine japan drier. He says, You shall have it, for that is just what we give them; that he had satisfied them and they used the same kind of machine that we did for drying. I told him I would not have benzine goods if I knew it; that would not satisfy me in my process. We received the sample barrels, but had not made any use of those sample barrels prior to June 24th, 1881. After the contract was signed we went ahead and used their goods. Noth-
83 ing further occurred until early in the following spring. Complaints that the paint was dropping off our cloth came in from the Wyeth Hardware Co., of St. Jo.; Sargent & Co., of New York; from Ducharme, Fletcher & Co., of Detroit; Wittie Hardware Co., of St. Louis; Richards & Conover, of St. Jo., and others. We painted about 3,500,000 square feet of wire cloth with the Berry material between September, 1881, and May or June, 1882. I began painting and drying artificially by this process in 1872, and we never had complaints of any magnitude of our paint coming off, except in this case when I used the Berry japan, and with the use of that japan my trouble began and continued during the time I used their stuff until I stripped the cloth I had on hand and repainted it. In addition to the names I stated, I had cloth returned from Rogers, Engle & Co., of Dayton, Ohio; Morgan & Page, of Fort Wayne. This cloth was all stripped and freight paid both ways. Then I examined all my stock on hand, besides what I had returned to me, and I found that I had 430,000 feet of cloth painted with the Berry japan, and this cloth was all stripped and repainted. The only way that I could detect the defects in this Berry article was by using it or by analysis, and, as I was not a chemist, I supposed the standing of Berry Bros. was a sufficient guarantee that I would get the goods that I bought. When this trouble arose I went first to a German chemist in Brooklyn and got him to make an analysis. The chemist has gone to St. Louis. This was in the spring of 1882. That analysis was referred to in the letter dated June 16th, 1882, to Berry Bros. Then I went to Mr. Arvine and got him to make an analy-
84 sis, thinking that the first man might be mistaken; and later on I went to Prof. Doremus. The samples that I took them to be analyzed I drew from a barrel—one of the barrels I had received from Berry Bros., marked "Berry Bros., Japan." First, I put the japan into a little tin can. I saw it taken from the barrel. It was put into a little tin can and then sealed up, and the can was put into a closet and locked up, and the sample was taken from that can by Mr. Butman and myself and delivered to Mr. Arvine and Dr. Doremus. The paint that I used to mix with this japan was the same that I had used previously with other japans.

Defendants' counsel here put in evidence the contract, heretofore marked for identification, between Berry Bros. and The De Witt Wire Cloth Co.; which is as follows:

DEFENDANTS' EXHIBIT "S." August 28th, 1880.

Memorandum of agreement entered into this day by and between Berry Bros., varnish manufacturers, of Detroit, Michigan, and The De Witt Wire Cloth Co., of 90 John St., New York city. N.Y.

Said Berry Brothers agree to furnish the above-named De Witt Wire Cloth Co., of New York city, their season's supply of varnishes, japans, and asphaltums at the prices named at foot, and to deliver the same in Belleville, N. J., or New York city, in any quantity from time to time as wanted during the life of this agreement, and also guarantee all the goods ordered to be the best of their kind and equal to those formerly had of them, the season to close not later than Nov. 1st, 1881.

85 Said De Witt Wire Cloth Co. agree on their part to purchase all their varnishes, japans, &c., of Berry Brothers for the season named, and to settle for the same at six months from the date of each invoice—

Turpentine copal varnish @ 60c. p'r gall.
Turpentine japan drier @ 50 " "

BERRY BROTHERS,
Per A. HOOPER.
DE WITT WIRE CLOTH CO.,
J. G. DE WITT, *Treas.*

(By defendants' counsel:)

Q. Was anything said by Mr. Hooper on the occasion of the making of the contract, June 23rd, 1880, while Mr. Butman and yourself were present, in respect to the goods which he had furnished the De Witt Wire Cloth Co.?

To which question plaintiffs' counsel duly objected, and the court sustained the objection, and the defendants' counsel duly excepted.

Q. Was anything said by him at all respecting the character of the goods that he proposed to furnish you for your factory?

To which question plaintiffs' counsel objected, and the court sustained the objection, and defendants' counsel duly excepted.

(By defendants' counsel:)

Q. How much less was the wire cloth worth painted with the Berry japan drier by your process than it was worth or would have been worth when painted in the usual way with the turpentine japan drier of the character contracted for or of the character you usually used?

86 To which question plaintiffs' counsel objected, and the court sustained the objection, and defendants' counsel duly excepted.

(By defendants' counsel:)

Q. Was the cloth painted by your process while using the Berry

japan that was delivered under this order worth more or less per yard than the cloth painted in the usual way with a fair article of turpentine japan drier?

To which question plaintiffs' counsel duly objected, and the court sustained the objection, and defendants' counsel duly excepted.

(By defendants' counsel:)

Q. Please state to the jury what damages, if any, you have suffered from painting your cloth during the period in question with the Berry Bros.' turpentine drier furnished under this contract?

To which question the plaintiffs' counsel duly objected, and the court sustained the objection, and defendants' counsel duly excepted.

Reclamation was made against the defendants by customers to whom we had sold the product resulting from the use of the Berry japan.

Defendants' counsel moved to amend his answer by inserting for folio 3 of the answer, after the words "Commencing September, 1881," the following: "Under an express or implied warranty that such goods should be adapted to use in painting wire cloth by a special process known to plaintiffs at the time, by which said wire cloth, when painted, was artificially dried by steam."

Which motion plaintiffs' counsel duly opposed, and the court denied the same.

87 The court then permitted the defendants to amend their answer and allege special damage, and file the same *nunc pro tunc* as the same appears in the record herein, without prejudice to their right to insist that the rule of the damages relied upon in their original answer and the bill of particulars based upon the same is applicable to this case.

The witness then further testified that 430,000 square feet of plain cloth was stripped and repainted, and 75,000 square feet of figured cloth was stripped and repainted. Of that plain cloth, about 125,000 or 130,000 square feet was cloth that had been returned.

When the cloth was returned I made a thorough examination of my stock on hand and found the character of the goods on hand the same about as the character of the goods returned, except that the goods returned had been manufactured between September and January and the other goods were manufactured much later in the season. The consequence was that the goods manufactured in the early part of the year had much more time to dry out the oil, and the paint came off more readily than from cloth that was painted later. I stripped all these goods and then sold them. By so much handling the cloth suffered considerable depreciation, amounting to at least one-half a cent a foot, and the cost in addition of stripping and repainting was one-half a cent a foot, making on 430 thousand square feet, $4,300 loss. On the figured cloth there was a loss of about 3 cents per square foot, amounting to $2,250. It had to be stripped and repainted and sold as ordinary cloth. This work was all done in my factory and under my direction.

(By defendants' counsel:)

Q. What loss of trade did you sustain?

To which plaintiffs' counsel duly objected, and the court
88 sustained the objection, and defendants' counsel duly excepted.

The witness then testified:

In respect to these goods returned by my customers I paid the expenses of cartage and other incidental expenses attending their return, and for freight and so on. We did not detect any benzine in the turpentine drier delivered by Mr. Berry before we began to use it.

Being cross-examined by plaintiffs' counsel, he said:

I saw Mr. Hooper, the agent for Berry Bros., several times before I left the De Witt Wire Cloth Company. He used to come in occasionally and see James G. De Witt. Have known Berry Bros. by reputation six or seven years. I have been using in my factory since I started the same patent that the De Witt Wire Cloth Company used when I was connected with them. The machine is not identically the same, but the process is substantially the same. We get at 3,500,000 square feet by knowing how many feet were produced a week in our factory and how many weeks we worked. We produced about 30,000 a week, and shut down more or less in July and August. We had some of the Stokes japan on hand when we made the contract with the Berry Bros., which we used up to July 1st, and we began on the Berry japan, I think, in September. Mr. Butman was our general superintendent up to the time he left. When he was away I was there. Two of our customers sent us back at least 125,000 feet of wire cloth. There was much more than that in all sent back. Our works started in 1879. The leading houses in this line of goods usually fixes a standard price; the other manufacturers make their prices about the same.

89 Q. How much did you, and by that I mean J. H. De Witt & Son, undertake to cut into the standard prices during the year of 1881 and 1882?

Objected to by defendants' counsel as assuming a fact not in evidence; which objection the court overruled, and defendants' counsel duly excepted.

A. I do not think we cut the prices at all in 1881. We purchase our wire from the Washborne & Moen Manufacturing Company. We use size 34 in filling and 33 in warp; 34 is a small fraction than 33. Bending the wire is a practical test, but a very severe test, to see whether the paint will adhere. The wire cloth has got to be perfectly and thoroughly dry first before any test should be applied. It would take six months after the cloth was painted to know whether the paint will drop off or not. In 1881 and 1882 I bought paint of Adler & Sons.

Q. Under what name did you buy that paint?

To which question defendants' counsel duly objected, and the court overruled said objection, and defendants' counsel duly excepted.

A. I do not remember that brand.

Q. Was it always the same brand?

A. Yes, sir; the paint that I bought was adulterated paint; we all use that. It costs about 4 cents a pound. We mix the paint with the oil, japan, and a small proportion of varnish. We bought and used thirty barrels of oil in connection with this Berry japan. The oil is used to make the paint thicker, the japan to thin the paint. We bought this japan for its body and its adhesive qualities as well as dryer.

90 Q. Have you not said a little while ago that oil is the adhesive property of the paint?

A. Not by any means; gums in japan are important. I regard turpentine japan drier as divided into three distinct parts—turpentine and japan, which contains the gummy and adhesive qualities, and a drier. During the time that we were using the Berry varnish and drier we purchased benzine in small quantities for the purpose of cleaning the rolls with which the paint was applied to the wire cloth. A thermometer, which, as I have testified, shows 140° of heat in the box, stood about in the middle of the box. This box was heated with steam pipes. Turpentine heated up to 140° would all evaporate in no time, but in combination with other ingredients, such as oil and gum, it would take a long time. In the letter written under my direction by Mr. Butman I say: "We have received the two barrels and will give your goods a trial within a few days." We did not try the sample barrels because we were using other stuff and were going to shut down. In my conversation with Mr. Hooper at the time the contract was made nothing definite was said about the mode in which I proposed to use either the varnish or the drier. Mr. Hooper shut me off of everything by saying the goods satisfied the De Witt Wire Cloth Co., and that they were turpentine japan goods. He knew that I was using the same kind of a machine that they used. He said that he understood exactly how they used it, and he was satisfying them with his goods; he had been out at their factory.

Redirect examination by defendants' counsel:

91 Since we ceased to use the Berry japan we have used about the same amount of oil and the same amount of japan as we did during our trial of the Berry japan.

When referring to the rolls connected with our painting process I mean to say that there are two twelve-inch felt rolls about six feet long and covered with felt. Then there is a third roll that revolves in the trough that carries the paint. The paint is carried from the roll that runs into the trough and the felt roll absorbs the paint from this third roll. When they are in motion of course the cloth is being painted, and when they are taken out at night they are softened down with a brush dipped in benzine; that benzine runs off those rolls into the trough, and then the trough is cleaned with the benzine, and that benzine is, of course, colored more or less with

the paint, and that is poured into a tin can. Whatever is left of it after it has been thoroughly used goes, of course, into the paint. I am quite certain that we don't use a gallon a day. When you take that in connection with using a barrel of paint a day, or a barrel and a half I think we are using now, it must be a very small percentage of benzine that gets into the paint. I have worked on this painting process since 1870 and have spent a great deal of time on it. The paint must be thoroughly dry before it can be fairly tested; then the gummy qualities will show their virtue. Wire cloth is from two to four feet wide, but we always sell it by the square foot. We use paint simply as a coloring matter—to give color. We buy it as adulterated paint and know it to be adulterated.

92 Pure paint costs 40 and 50 cents a pound. Since I had this trouble I have experimented in reference to japan and varnish and paint, and I have discovered that the adulteration of the paint has nothing to do with the dropping off. I find that I used 24 barrels of oil during the time that we were using the Berry japan.

HENRY C. VALENTINE, being duly sworn for the defendants, testifies:

Have been in the varnish business, manufacturing varnish, for thirty years. My firm is Valentine & Company.

I know the terms used in that trade. A turpentine japan drier has a small quantity of linseed, cooked more than varnish is cooked, and an increased quantity of siccatives or driers, such as red lead, litharge, or manganese. I do not use benzine in japan driers; have not for a dozen years or more. I am only making a specialty of coach articles. We don't make cheaper grades.

ROBERT W. CRANE, being sworn as a witness for defendants, testifies:

I was employed by Messrs. De Witt & Son a few years ago. Under their direction I stripped some wire cloth of paint. It was about two years ago. There were 1,462 rolls so stripped, containing 325,000 square feet. Some of it had been shipped and returned and some the paint came off before it was shipped. The cloth was in a very bad condition when I undertook to strip it. I made a solution of caustic soda and lime and salt, and the rolls were wound up tight and had to be made loose, and then I gave them a bath in this solution, and then hoisted them into another bath to rinse the soda off, and then put into a bath of lime water to pre-

93 vent rusting; then we dried and put them through the paint machine and painted them again. This was between March 24th and June 6th, 1883.

ARTHUR CRANDALL, being duly sworn as a witness for the defendants, testified:

Am in the employ of De Witt & Son; took an inventory of certain cloth Mr. De Witt pointed out on August 1st, 1884. There was in all 161,153 square feet. Of this 86,732 was figured. We sold 14,326 feet at a cent a foot. We sold 6,264 feet at one cent and two-

To which question defendants' counsel duly objected, and the court overruled said objection, and defendants' counsel duly excepted.

A. I do not remember that brand.

Q. Was it always the same brand?

A. Yes, sir; the paint that I bought was adulterated paint; we all use that. It costs about 4 cents a pound. We mix the paint with the oil, japan, and a small proportion of varnish. We bought and used thirty barrels of oil in connection with this Berry japan. The oil is used to make the paint thicker, the japan to thin the paint. We bought this japan for its body and its adhesive qualities as well as dryer.

90 Q. Have you not said a little while ago that oil is the adhesive property of the paint?

A. Not by any means; gums in japan are important. I regard turpentine japan drier as divided into three distinct parts—turpentine and japan, which contains the gummy and adhesive qualities, and a drier. During the time that we were using the Berry varnish and drier we purchased benzine in small quantities for the purpose of cleaning the rolls with which the paint was applied to the wire cloth. A thermometer, which, as I have testified, shows 140° of heat in the box, stood about in the middle of the box. This box was heated with steam pipes. Turpentine heated up to 140° would all evaporate in no time, but in combination with other ingredients, such as oil and gum, it would take a long time. In the letter written under my direction by Mr. Butman I say: "We have received the two barrels and will give your goods a trial within a few days." We did not try the sample barrels because we were using other stuff and were going to shut down. In my conversation with Mr. Hooper at the time the contract was made nothing definite was said about the mode in which I proposed to use either the varnish or the drier. Mr. Hooper shut me off of everything by saying the goods satisfied the De Witt Wire Cloth Co., and that they were turpentine japan goods. He knew that I was using the same kind of a machine that they used. He said that he understood exactly how they used it, and he was satisfying them with his goods; he had been out at their factory.

Redirect examination by defendants' counsel:

91 Since we ceased to use the Berry japan we have used about the same amount of oil and the same amount of japan as we did during our trial of the Berry japan.

When referring to the rolls connected with our painting process I mean to say that there are two twelve-inch felt rolls about six feet long and covered with felt. Then there is a third roll that revolves in the trough that carries the paint. The paint is carried from the roll that runs into the trough and the felt roll absorbs the paint from this third roll. When they are in motion of course the cloth is being painted, and when they are taken out at night they are softened down with a brush dipped in benzine; that benzine runs off those rolls into the trough, and then the trough is cleaned with the benzine, and that benzine is, of course, colored more or less with

the paint, and that is poured into a tin can. Whatever is left of it after it has been thoroughly used goes, of course, into the paint. I am quite certain that we don't use a gallon a day. When you take that in connection with using a barrel of paint a day, or a barrel and a half I think we are using now, it must be a very small percentage of benzine that gets into the paint. I have worked on this painting process since 1870 and have spent a great deal of time on it. The paint must be thoroughly dry before it can be fairly tested; then the gummy qualities will show their virtue. Wire cloth is from two to four feet wide, but we always sell it by the square foot. We use paint simply as a coloring matter—to give color. We buy it as adulterated paint and know it to be adulterated.

92 Pure paint costs 40 and 50 cents a pound. Since I had this trouble I have experimented in reference to japan and varnish and paint, and I have discovered that the adulteration of the paint has nothing to do with the dropping off. I find that I used 24 barrels of oil during the time that we were using the Berry japan.

HENRY C. VALENTINE, being duly sworn for the defendants, testifies:

Have been in the varnish business, manufacturing varnish, for thirty years. My firm is Valentine & Company.

I know the terms used in that trade. A turpentine japan drier has a small quantity of linseed, cooked more than varnish is cooked, and an increased quantity of siccatives or driers, such as red lead, litharge, or manganese. I do not use benzine in japan driers; have not for a dozen years or more. I am only making a specialty of coach articles. We don't make cheaper grades.

ROBERT W. CRANE, being sworn as a witness for defendants, testifies:

I was employed by Messrs. De Witt & Son a few years ago. Under their direction I stripped some wire cloth of paint. It was about two years ago. There were 1,462 rolls so stripped, containing 325,000 square feet. Some of it had been shipped and returned and some the paint came off before it was shipped. The cloth was in a very bad condition when I undertook to strip it. I made a solution of caustic soda and lime and salt, and the rolls were wound up tight and had to be made loose, and then I gave them a bath in this solution, and then hoisted them into another bath to rinse the soda off, and then put into a bath of lime water to pre-

93 vent rusting; then we dried and put them through the paint machine and painted them again. This was between March 24th and June 6th, 1883.

ARTHUR CRANDALL, being duly sworn as a witness for the defendants, testified:

Am in the employ of De Witt & Son; took an inventory of certain cloth Mr. De Witt pointed out on August 1st, 1884. There was in all 161,153 square feet. Of this 86,732 was figured. We sold 14,326 feet at a cent a foot. We sold 6,264 feet at one cent and two-

tenths a foot, and 2,639 feet at one cent, and the balance of it at one and a third cents per foot. I have made a computation of the difference between the prices obtained for the goods as they were actually sold and the prices which they would have brought if sold in 1882 at 2.35 cents, and it shows a difference of $1,910.87. I have also calculated the difference between 36,732 feet figured cloth if sold at 2.35 cents and at 5 cents, and it amounts to $2,298.48. At 10 cents per hundred square feet it would cost to repaint 86,732 feet of figured cloth $86.73, and at 50 cents per hundred square feet it would —, to strip and repaint 194,600 feet, $973.00. The total loss suffered by Mr. De Witt, according to these calculations, is $5,269.08.

Defendants rest.

ALFRED HOOPER, being recalled by plaintiffs, stated:

That in the conversation that he had with Mr. De Witt nothing was said about the use the drier and varnish were to be put to, except that Mr. De Witt said that he desired to use it for the same purpose that the company used it.

94 Q. Was anything said about the way it was to be used?

To which defendants' counsel objected as leading, as immaterial, and incompetent, and the court overruled the objection; to which ruling defendants' counsel duly excepted.

On being cross-examined he stated:

In my conversation with Mr. De Witt I told him that we were supplying the De Witt Wire Cloth Company to their satisfaction. I supplied them in 1878, 1879, and 1880. I think the contract that I made with them in October is the only written contract that we ever made with them; may be another, but I don't remember.

By the court:

Q. Did Mr. De Witt tell you that he must have turpentine goods?
A. Mr. De Witt told me that he must have the same goods that I furnished the other company, and I told him that there was what was called turpentine japan drier and turpentine copal varnish.

By defendants' counsel:

Q. Can you answer the court's question? Did Mr. De Witt tell you that he must have turpentine goods?
A. In that sense he did; turpentine copal varnish and turpentine japan drier; in that sense and not in any other way.
Q. Did Mr. De Witt on that occasion tell you that he must have turpentine goods?
A. According to this contract.
Q. He told you that?
A. Certainly; he wanted turpentine goods the same as the other company had. All that I know about the constituent ingredients of the goods is by their brands and their names. I have sold japan driers for Berry Bros. by other names than turpentine japan

95 drier; for instance, a coach japan, pure turpentine japan,

extra japan, burned turpentine japan. We brand according to *are* orders.

Q. Are they all made of benzine?

A. I cannot tell how they are made.

Q. You do not know anything about it?

A. No, sir; I do not. The lowest grade that we made was called the burned turpentine japan; it is just above the article sold under the name of the turpentine japan drier. I only mentioned one kind of turpentine japan drier to Mr. De Witt, and I don't think I mentioned it under any other name except under the name of turpentine japan drier. I said nothing to Mr. De Witt about brands.

HERBERT WALKER, being recalled by plaintiffs, testified:

I have been engaged in the manufacture of the articles that was sent to the wire-cloth company, Messrs. De Witt & Son, under the name of turpentine japan drier since 1879 down to the present time, extensively.

Q. How extensively has that brand been distributed by Messrs. Berry Bros. between 1879 and the present time?

Objected to by defendants' counsel as immaterial, irrelevant, and incompetent, and having nothing to do with the case; which objection the court overruled, and defendants' counsel duly excepted.

A. That article is sent to all parts of the United States and its use is continually increasing since 1879; that article has been made under my supervision and direction by Berry Bros.

Q. What are the proportions of benzine and turpentine in
96 that article which you distributed in this way by that name?

A. There is 50 per cent. of turpentine and 50 per cent. of benzine; that percentage has never varied. When at Detroit since this trial commenced I tested paint mixed with this article and dried under a temperature of 110°, and found that it adhered perfectly; when the heat was increased up to 150° the paint dried that way would crack off.

Being cross-examined by defendants' counsel, the witness stated:

That he had never had any practical experience in mixing paints and never saw the operation of painting in De Witt Wire Cloth Company or in the factory of J. H. De Witt & Son; had no knowledge of their methods of applying heat.

I used the same kind of material that is in the controversy here. I put on two coats of paint. I left them in the oven about an hour.

JOSEPH H. BERRY, being duly sworn for plaintiffs, testified:

I am one of the plaintiffs; our firm has been in existence 27 years; manufacture all descriptions of varnish.

Q. Do you know the brands of varnish and drier mentioned in this contract?

Defendants' counsel objected that it was immaterial and irrelevant what the brands were, and that the witness was not shown to be acquainted with commercial or trade designations in the city of New

York, where the contract was made; which objection was overruled by the court, and defendants' counsel duly excepted.

A. I do.

Q. How long have Messrs. Berry Bros. been making and
97 selling varnish under those names?

Defendants' counsel objected the same as before, and the court overruled said objection, and defendants' counsel duly excepted.

A. A number of years. I have had practical knowledge in the manufacture of varnish and japans upward of 20 years. I originally made the formula for manufacturing these articles, or it was made under my supervision, about 10 years ago.

Q. Now, from that time to this have you been making and selling extensively according to the formula and under those names?

Defendants' counsel duly objected on the ground that it was irrelevant and incompetent and immaterial and as calling for testimony respecting the commercial designations when the witness had not been qualified; which objection the court overruled, and defendants' counsel duly excepted.

A. Yes; we have. We have been sending it all over the country.

Testimony closed.

Plaintiffs' counsel asked the jury to award a verdict in favor of the plaintiffs for the sum of $1,687.51, with interest thereon from May 15th, 1883.

Defendants' counsel asked the jury to award a verdict in favor of the defendants in the sum of $7,096.58 as damages.

Plaintiffs' counsel handed up to the court written requests to charge as hereinafter stated.

Defendants' counsel handed up to the court written requests to charge the jury as hereinafter stated.

98 The court thereupon charged the jury as follows:

Charge of the Court.

SHIPMAN, *J.:*

GENTLEMEN OF THE JURY: This action was brought up by the plaintiffs against the defendants to recover the contract price agreed to be paid by the defendants for a certain quantity of turpentine japan drier and turpentine copal varnish alleged to have been delivered to and received by the defendants between November 9th, 1881, and May 15th, 1882, the contract price amounting to $1,638.51, with interest thereon from May 15th, 1882.

It is in evidence that a quantity of barrels alleged to contain turpentine japan drier and turpentine copal varnish, and amounting, *to* the respective contract prices of 55 cents per gallon and 65 cents per gallon, to the sum which I have named, were delivered to and received by the defendants, and that a large part of said articles were used by them in the painting of the window-screen wire cloth which they manufactured, and that a large part of said cloth was sold and went into consumption and was not returned, but that five

barrels of the drier and varnish were not used, on the ground that it did not comply with the contract.

As a defence for the payment of any portion of this sum and as a counter-claim for the recovery by the defendants of a large sum by way of damages, the defendants say that these articles were furnished upon a special written contract containing affirmative agreements on the part of the plaintiffs in regard to the quality
99 of the articles, which were not complied with, and that this non-compliance, by reason of defects which could not be discovered until the cloth had been painted for some six months, caused great pecuniary damage to the defendants, which not only equaled but far exceeded the contract price of the drier and the varnish, so that not only these articles were of no value, but were a positive injury to the defendants.

The written contract is in evidence and contains in itself all the obligations which the plaintiffs undertook to perform, to wit: That they agreed to furnish the defendants goods of exactly the same quality as were then being made for the De Witt Wire Cloth Company of New York and as per sample barrels delivered and to be the articles respectively commercially known as turpentine japan drier and turpentine copal varnish.

If the plaintiffs failed to furnish articles in accordance with these three requirements, and in consequence of and by reason of such failure and by the use of goods which were furnished and which were inferior in one of these respects the defendants suffered pecuniary damage or loss equal in value to the contract prices, then the plaintiffs cannot recover; and if the defendants direct pecuniary damage, resulting from the use of these goods, thus inferior to the contract obligations of the plaintiffs, exceeding the amount of the plaintiffs' bill, then for such excess of damage the defendants may recover, provided (and this proviso applies to both branches
100 of this paragraph) the defendants did not accept the goods with full opportunity to know of the alleged defects.

The plaintiffs have given evidence (and I do not understand that there is substantial rebutting testimony) that these goods so furnished were equal to the samples and were equal in quantity to those which were furnished to the De Witt Wire Cloth Company; but the defendants insist that the goods were not those commercially known as "turpentine japan drier" and "turpentine copal varnish," but were far inferior and were largely intermixed with benzine in the place of turpentine, and that by reason of such intermixture the paint upon the cloth, after the cloth had been rolled up, after a time cracked and flaked off, and so the cloth became unsaleable, and that the admixture of adulteration would not be detected in the samples without chemical analysis.

Upon the points of acceptance or correspondence with the samples it is true that if the goods were not the articles commercially known by the description names which I have given, and if the samples did not disclose the adulteration, but the defect was a secret one which could not be discovered except by analysis by those skilled in the practice of chemistry or by other expedients which could not

be resorted to by the ordinary purchaser, then the defendants are not debarred from their right to recover, either by the fact that the goods corresponded with the samples or that they received and used the goods in ignorance of this latent defect.

The case comes down, then, to the question whether these articles were commercially known as turpentine japan and so
101 forth, and this question is to be decided by a preponderance of the testimony.

The defendants say and have introduced sundry witnesses who are in the business of manufacturing japan and varnishes who say that "turpentine japan" and "turpentine varnish" mean articles containing pure turpentine or turpentine mixed with benzine, and that the articles containing a substantial admixture of benzine and turpentine are called "turpentine and benzine" japan, and so forth. Mr. Bayley, Mr. Page, Mr. Elmendorf, Mr. Brooks, Mr. Neefus, all testify in substance that "turpentine japan drier" means an article composed, so far as the liquid is concerned, of pure turpentine.

I understand that Mr. Wood testifies (and this is the position of the plaintiffs) that an article of which the liquid portion is half turpentine and half benzine is commercially known as "turpentine japan." The plaintiffs say that these other witnesses whose names I have mentioned, Mr. Bayley, Mr. Page, &c., are talking when they speak on the subject of their own high-priced articles and not of an article which they do not manufacture themselves, and that this article of the plaintiffs was a well-known article and universally understood to be a cheap and mixed article, but coming under the commercial name of "turpentine." Now, then, the point for you to decide in this part of the case is this:

Is an article of which the liquid is composed in equal parts of turpentine and benzine the article commercially known as
102 turpentine japan, or do the requirements of the trade demand an article composed exclusively of pure turpentine or in which the turpentine so largely preponderates that benzine is but a very small portion?

If you find that the plaintiffs are right in this matter, why then you come to the question whether their article which they in fact furnished was an article which was commercially known as "turpentine japan;" in other words, whether the article which they furnished was composed of equal parts of turpentine and benzine; and upon this point the defendants introduce the testimony of Professor Doremus and Mr. Arvine, to show that upon any theory which can be adopted in regard to the proportions of the liquid this article which was furnished was not equal to the requirements of the contract and the requirements which I have given you. You recollect their testimony.

The question then comes to this: Is the testimony of Professor Doremus and Mr. Arvine to be relied upon as an accurate analysis of the goods which were sold in 1881–1882 to the defendants? If it is, then it can hardly be questioned that the goods were not commercially a turpentine article.

On the other hand, the plaintiffs' testimony is (and that you will

recollect) that the goods were prepared according to their ordinary and universal formula for this particular brand or branch of trade, and that the article was composed of an equal proportion of the two liquid ingredients.

If upon this part of the case you find that the plaintiffs have not complied with their contract, then you will come to the question of damages.

103 It will not be denied that the defendants experienced great trouble and incurred a serious loss from the cracking of their paint; but the first question is, Did this defect happen from the defective quality of the drier and the varnish? The defendants say yes—and say yes, because they have used the same quality of paint since (which is confessedly a very cheap article of paint), and that they have had no trouble; that all the conditions since are the same except the use of the Berry drier, and that they have had no trouble, and that therefore the conclusion must be that the Berry drier was the cause of the defect.

The plaintiffs say, on the other hand, that the trouble arose from poor paint or from the imperfect method of painting by the defendants' process, and they rely upon the fact that the process which was used was a process of first bathing the article in a tub or vat, then passing it through between rollers and subjecting it to a tolerably high degree of temperature, and say that the process was not sufficient to make the paint adhere and become equally and permanently diffused over the article.

Of course, if the defective condition of the wire cloth did not occur in consequence of the defects in the drier there is no further question in the case, but if it did the question is then as to the amount of damages.

The measure of damages is not the difference between the actual value of three and a half million square feet and the salable value of that quantity of a sound article, because nearly or quite

104 three million square feet were sold at some prices and never came back to the defendants.

The measure of damages is the exact pecuniary loss and damage to the quantity of feet which were returned and which were on hand, said to be 430,000 square feet, and to the figured cloth, and this is covered by the expense of stripping and repainting and the pecuniary loss which was necessarily sustained in consequence of the sale of the article made inferior by defect below what was the actual market price of sound articles at that time they were or could have been originally put upon the market.

Mr. TREMAIN: I do not desire to ask your honor to make any modification in the charge, but simply to permit me to take the benefit of the following exceptions:

I take the benefit of an exception to the refusal of your honor to charge each and every of the requests submitted by the defendants in writing and to the refusal to charge in respect to each request as made.

I take the benefit of an exception to that part of the charge of your

honor indicating that the measure of damages is not the difference between the selling prices of the entire three million five hundred feet, &c., and to what was said upon that particular topic.

I except also to that part of your honor's charge that says that the contract contains in itself all the obligations which the plaintiffs were to perform.

I take the benefit of an exception to that part of the charge which says that the plaintiffs have given evidence that the goods
105 were equal to the samples furnished by them and to the goods furnished to the De Witt Wire Cloth Company, and that there is no rebutting evidence on that subject.

Also to that part of the charge which speaks of witnesses testifying as related by the court in the charge. We contend that it has not been properly digested by the court in the paragraph on that topic.

Also that part of the charge — certain witnesses were named as speaking only of high-priced articles, and also that part of the charge which speaks of the goods of the plaintiff as prepared according to a formula. We except to what was said upon that subject.

We also except to that part of the charge where your honor said that the plaintiffs rel*ies* upon the facts that the process as used by Mr. De Witt was not sufficient to make the paint adhere, we insisting that no such fact or evidence to sustain it has been shown. We take the benefit of an exception to that.

Defendants' Requests to Charge.

Defendants' counsel requests the court to charge the jury — the following propositions:

1st. If the jury find that the goods delivered defendants as turpentine japan drier were not the best of their kind (as guaranteed by reference to the contract with De Witt Wire Cloth Company), they must find for the defendants.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

2nd. If the jury find that the goods delivered were what
106 is known in the trade as "turpentine and benzine" goods or "benzine" goods as distinguished from "turpentine" goods, then they must find for the defendants.

Defendants' counsel excepts to the refusal of the court to charge the above requests as submitted in writing and to the refusal to charge it as made.

3rd. The evidence shows without contradiction that goods compounded of an equal quantity of turpentine and benzine are commercially designated and generally known in trade as "turpentine and benzine," or union goods.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

4th. The jury are to determine what in the commercial world (among merchants) is the article called turpentine japan drier, as they are to weigh the evidence of experts and witnesses acquainted with that line of business and to determine from the weight of testimony what the article turpentine japan drier is; and if the preponderance of testimony is in favor of defining this article as one which does not contain benzine as one of its substantial constituent ingredients, the jury must decide in favor of the defendants and award them such damages as they may have suffered under the rules laid down by this court.

Defendants' counsel excepts as to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

107 5th. If the jury find that there are three different articles known in trade, respectively, as T. japan, T. & G. japan, and benzine japan, and that the articles furnished did not belong to the first commercial class or description, they will decide for the defendants.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge as made.

6th. Plaintiffs must establish to the satisfaction of the jury, as a condition precedent to the recovery, that the merchandise plaintiffs delivered to the defendants under the contract is that which is described in commerce as "turpentine japan drier;" or else defendants are entitled to a verdict.

Defendants' counsel excepted to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

7th. The contract being executory in its nature—that is, to be performed at a future time—the plaintiffs must show, in order to entitle them to recover, not only that they delivered to the defendants the article recognized in commerce as "turpentine japan drier," but also that the article thus delivered was a fairly merchantable and salable article under that description.

Defendants' counsel excepts — the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

8th. If the article delivered was adulterated with foreign substances which destroyed or injured it as a turpentine japan
108 drier, so as not to be commercially acceptable as such, the plaintiffs did not fulfill their contract and cannot recover.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

9th. The plaintiffs were manufacturers of japan, and by their contract with defendants became obligated to furnish a merchantable and salable "turpentine japan drier," free from latent defects that could not be ascertained by inspection.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

10th. The phrases in the contract, "to be exactly the same quality as plaintiffs make for the De Witt Wire Cloth Company and as per sample barrels delivered," do not affect the obligations of the plaintiffs to deliver an article that shall answer the commercial designation of "turpentine japan drier of merchantable quality."

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

11th. The plaintiffs were under an obligation to deliver the best quality of turpentine japan drier, as per contract with De Witt Wire Cloth Company.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

12th. The contract being executory on the part of the
109 plaintiffs, who contracted as manufacturers with defendants as consumers, the defendants had a right to test thoroughly the goods delivered by plaintiffs under the contract before accepting the goods, and are not bound by a retention or apparent acceptance of the goods in advance of exhausting all reasonable tests of the character of the goods.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

13th. Moreover, goods of a designated description furnished under contract by the producer, with knowledge of the purpose for which they were purchased and without modification of their inaptitude for that purpose, will, in the absence of explanation, be presumed to be adapted to the purpose designated; and under these circumstances the purchasers were under no obligation to subject the goods to special tests before applying them in the usual way to the manufacture for which they were concededly bought.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

14th. Thus the goods might be used up by the purchasers and yet not be accepted by them under the contract; and it is for the jury to determine whether under all the circumstances of the case the Messrs. De Witt, with notice or full knowledge of what, in fact, the goods delivered were, accepted them as complying with the contract.

110 Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

15th. If plaintiffs deliver to the defendants under this contract an article which does not answer to the commercial designation of a "turpentine japan drier," and an ordinary inspection would not discover that it was not such an article, and defendants, in reliance upon the contract, used the article in their business, they can recover of the plaintiffs any direct damage they suffered on account thereof.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

16th. If the sample was not, in fact, an article answering to the commercial description contracted for (*i. e.*, turpentine japan drier and turpentine copal varnish), while appearing to be such, and not capable of being readily distinguished from such a designated article by reason of concealed defects or constituent ingredients, discoverable only by its use, then it is not material whether the articles that were actually delivered did correspond with the sample, for that of itself would not fulfill the contract.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

17th. The absence in the sample or in the article delivered of one of the constituent ingredients recognized as essential to the merchantable article described in the contract, or the presence in sam-
111 ple or articles delivered of an adulterant not a constituent ingredient of the merchantable article, is a species of fraud which the law does not accept as the basis of the performance of a legal obligation.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

18th. The defendants expressly claim that under all circumstances of this case a fraud has been perpetrated upon them, the extent and character and effects of which are to be determined by the jury.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

19th. In order to find fraud it is not essential for the jury to impute a moral guilt to the manufacturers. It is enough for the purposes of this case to support a verdict for the defendants if the product of the Berry Brothers sold to the defendants was so adulterated as to destroy its merchantable character under the designation used in the contract.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

20th. If the defendants have not received the goods contracted for, but something different, and are, in the estimation of the jury, entitled to a verdict, then the defendants' damages, if any, are to be ascertained and awarded.

112 Defendants' counsel excepts to the refusal of the court to charge request as submitted in writing and to the refusal to charge it as made.

21st. One measure of damages in such a case is the difference between the value of the defendants' wire cloth manufactured with the article the Berry Bros. furnished and such cloth manufactured with the article Berry Brothers agreed to furnish.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

22nd. Gains or profits prevented, as well as actual losses accrued directly, dependent on plaintiffs' failure to deliver the goods contracted for, are proper to be included in the jury's measure of damages.

Defendants' counsel excepts to the refusal of the court to charge the above request as submitted in writing and to the refusal to charge it as made.

The jury then retired and rendered a verdict for the plaintiffs for two thousand and thirty-six dollars and twenty-five cents.

And inasmuch as the foregoing matters of fact and law and the said several exceptions do not appear by judgment record in this case, therefore, on the prayer of the defendants' counsel, the foregoing has been settled and signed by the judge who tried the same, as and for the plaintiffs' bill of exceptions in this case, this 12 day of March, 1886, at the aforesaid term of this court.

(Signed) N. SHIPMAN, *Judge.*

113 [Endorsed:] U. S. circuit court. Joseph H. Berry & ano., plaintiffs, against Josiah H. De Witt & ano., defendants. Copy. Bill of exceptions. Henry C. De Witt, attorney for defendants; office & P. O. address, 206 Broadway, New York city. To ——— ———, attorney for —: Due and timely service of a copy of the within is hereby admitted. Dated ——— —. ——— ———, attorney for —. U. S. circuit court. Filed April 12, 1886. Timothy Griffith, clerk.

114 Circuit Court of the United States for the Southern District of New York.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

SIR: Please take notice that on the bill of exceptions as made

and settled herein, the affidavits with copies whereof you are herewith served, and all the pleadings, proceedings, and exceptions herein, a motion will be made before the Hon. Nathaniel Shipman, at a stated term of this court, to be held at the United States court and post-office building, in the city of New York (in room 100), on the 21st day of April, 1886, at 11 o'clock in the forenoon (or on such day as may be appointed by the judge presiding at the trial of this cause), or as soon thereafter as counsel may be heard, for a new trial of this action, together with such other or further order or relief in the cause as to the court may seem meet and proper, on the grounds that the verdict is against evidence, against the weight of evidence, and against law, because of the errors committed at the trial and because of the misconduct of the jury and bias and prejudice of the jury or some of them, and also because it appeared to the court that said trial did not result in a fair and impartial verdict.

115 Dated New York, April 17th, 1886.

Yours, &c., HENRY C. DE WITT,
Attorney for Defendants.

TREMAIN & TYLER, *of Counsel.*

To P. Q. Eckerson, plaintiffs' attorney.

116 SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Circuit Court of the United States for the Southern District of New York.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

Josiah H. De Witt, being duly sworn, says:

I am one of the above-named defendants, and I attended before the court every day on the trial of this action, which took place on the 23rd, 24th, 27, 28, and 29th days of October, and the 4th, 5th, and 6th days of November.

John B. Baker acted as foreman of the jury that was empanelled for the trial of said action.

On the second day of the trial said Baker acted in a very impatient manner while defendants' counsel were presenting their part of the case; undertook to rebuke defendants' counsel, saying that he asked too many questions, and thereby unnecessarily prolonged the trial and wasted the time of the jury, and stated that other members of the jury agreed with him.

On the third day of the trial, when the court announced the usual half hour's recess for luncheon, Juryman Baker
117 requested that the time of adjournment be extended to three-quarters of an hour, which request was granted by the judge presiding. On my return to the court-room (before that of the judge) I saw said Foreman Baker engaged in intimate and earnest conversation with the plaintiff, Joseph H. Berry, in the court-room,

and such conversation continued for about five minutes after my arrival. As I passed by Mr. Baker and Mr. Berry I heard said Baker remark to Mr. Berry, "I had a very pleasant time with your brother when we went fishing together;" and later said Juryman Baker was heard to remark to said plaintiff Berry, "Such a claim will never be allowed."

On other days during said trial said Juryman Baker plainly showed his animus against defendants—on one occasion asking the trial judge to restrict defendants' line of defence, as taking too much time; and when I was on the witness stand giving testimony and illustrating how paint applied to my manufactures by the medium of plaintiffs' wares crumbled and flaked off, said Foreman Baker took the exhibits I produced in his hands, glanced at them momentarily, and passed them to other jurors, at the same time remarking, with a smile, that he couldn't see any difference in them.

During said trial several disinterested spectators, whom I did not then and do not now know, remarked to me that the jury was evidently against me, as they took their cue from the foreman, who was plainly against defendants getting a verdict in the case.

From my own observations as above stated and from said statements made to me, I aver, and verily believe to be true, that said foreman of the jury, John B. Baker, was, as a friend of plain-
118 tiffs, unduly prejudiced against my firm, the defendants; had prejudged my case before hearing all the evidence, and used his position as foreman of the trial jury to unjustly influence the other members thereof to render a verdict in favor of plaintiffs against the weight of evidence, and that in conversing with one of the plaintiffs about this suit during the trial thereof he was guilty of misconduct; all of which disqualified him from fairly and impartially determining the case as a juror, and prevented the rest of the jury from calmly and deliberately doing justice by defendants.

JOSIAH H. DE WITT.

Sworn to this 16th day of April, 1886, before me—
[L. S.] ROB'T P. GETTY, JR.,
Notary Public, Westchester Co.

Cert. filed in N. Y. Co.

119 Circuit Court of the United States for the Southern District of New York.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

Henry C. De Witt, being duly sworn, deposes and says—

That he has read the foregoing affidavit made by Josiah H. De Witt, and that the substantial facts therein stated are within deponent's knowledge and are true.

That on or about the third day of the trial of this action, upon deponent's entry in the court-room after the noon recess, he passed by the foreman of the jury, John B. Baker, who was at the time en-

gaged in earnest conversation with the plaintiff, Joseph H. Berry; that as deponent passed said Baker (whose back was toward deponent) he distinctly heard him say to said plaintiff that such a claim would never be allowed, or words to that effect.

At hat time defendants' counter-claim for damages had been brought to the attention of the jury, and from said foreman's manner and tone of voice and what has since transpired deponent was impressed with the idea that said Baker had been assuring plaintiffs that the jury would not allow defendants' counter-claim for damages in this action, and that said Baker had then already made up
120 his mind as to the verdict before defendants had completed the testimony in behalf of their counter-claim.

HENRY C. DE WITT.

Sworn to this 17th day of April, 1886, before me—
[SEAL.] (S'g'd) GEO. W. WALLACE,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

Endorsed: U. S. circuit court, southern dist. of N. Y. Joseph H. Berry & ano., plaintiffs, against Josiah H. De Witt & ano., defendants. Affidavit & notice of motion for new trial. Henry C. De Witt, attorney for defendants, 206 Broadway, N. Y. city. U. S. circuit court. Filed June 16, 1886. Timothy Griffith, clerk.

121 U. S. Circuit Court.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT and JOSIAH DE WITT, Jr.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Joseph H. Berry, being duly sworn, says: I am one of the plaintiffs. I reside in Detroit. I attended from Detroit upon the trial of the action and was present during portions of the trial.

The statement in the affidavit of Mr. Josiah H. De Witt that he saw Mr. Baker, the foreman of the jury, engaged in intimate and earnest conversation with me, and Mr. De Witt's further statement that he heard Mr. Baker remark to me "I had a very pleasant time with your brother when we went fishing together," and Mr. De Witt's still other statement that Mr. Baker was heard to remark to me "Such a claim will never be allowed" are all without foundation of fact.

My brother never, to my knowledge or that I ever heard, went fishing with Mr. Baker. Mr. Baker never said to me that
122 he had had a pleasant time with my brother when they went fishing together, or anything to that effect, and he never spoke to me about the claim.

The later statement in Mr. De Witt's affidavit to the effect that Mr. Baker was a friend of the plaintiffs is also absolutely untrue. I never saw or heard of Mr. Baker until I saw him upon the jury. I

never had any conversation with him about the suit nor did I ever have any conversation with him at any time upon any subject, unless it may have been to exchange the ordinary polite civilities when meeting him casually in the court-room. The trial lasted so long that the jurors learned who I was and I learned to know them as jurors. In meeting them in the court-room I may have passed the time of day. The trial of the case was very greatly prolonged by the defendants and their counsel. This did lead at times to manifestations of impatience on the part of the jurors generally.

Unfortunately my hearing is impaired. It was impossible for me to engage with Mr. Baker or with any one else in conversation which was not perfectly open to the whole court-room.

123 JOSEPH H. BERRY.

Sworn to before me this 29th day of May, 1886.

[L. S.] JAMES H. MASON,
Notary Public, Wayne Co., Mich.

[L. S.] STATE OF MICHIGAN, } ss:
County of Wayne, }

I, John J. Enright, clerk of said county and clerk of the circuit court for the county of Wayne, which is a court of record having a seal, do hereby certify that James H. Mason, whose name is subscribed to the jurat of the annexed instrument and therein written, was at the time of taking such jurat a notary public in and for said county, duly commissioned and qualified and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county, at Detroit, this twenty-ninth day of May, A. D. 1886.

JOHN J. ENRIGHT, *Clerk,*
By WM. MAY, *Deputy Clerk.*

124 (Endorsed:) U. S. circuit court. Joseph H. Berry and another against Josiah H. De Witt and another. Affidavits. P. Q. Eckerson, pl'ffs' att'y, 99 Nassau St., N. Y. Jno. E. Parsons, of counsel. U. S. circuit court. Filed Jun- 16, 1886. Timothy Griffith, clerk.

125 U. S. Circuit Court.

JOSEPH H. BERRY and THOMAS BERRY
against
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Thomas Berry, being duly sworn, says: I am one of the plaintiffs. If Mr. John B. Baker, the foreman of the jury impanelled for the trial of this action, said that he had a very pleasant time with me

when we went fishing together, he said something for which there was no foundation in fact. I cannot for one moment believe that Mr. Josiah H. De Witt heard Mr. Baker make any such statement or that Mr. Baker ever did say anything of the kind. I never went fishing with Mr. Baker. I never saw Mr. Baker, to my knowledge, in my life.

THOMAS BERRY.

Sworn to before me this 31st day of May, 1886.

[L. S.] JAMES H. MASON,
Notary Public, Wayne Co., Mich.

126 STATE OF MICHIGAN, } ss:
County of Wayne, }

I, John J. Enright, clerk of said county and clerk of the circuit court for the county of Wayne, which is a court of record having a seal, do hereby certify that James H. Mason, whose name is subscribed to the jurat of the annexed instrument and therein written, was at the time of taking such jurat a notary public in and for said county, duly commissioned and qualified and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary public and verily believe that the signature to the said jurat is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court and county, at Detroit, this twenty-ninth day of May, A. D. 1886.

[L. S.] JOHN J. ENRIGHT, *Clerk*,
By WM. MAY, *Deputy Clerk*.

127 (Endorsed:) Circuit court U. S., south. dist. of N. Y. Joseph H. Berry & ano. *v.* Joseph H. De Witt & ano. Affidavit. U. S. circuit court. Filed Jun. 16, 1886. Timothy Griffith, clerk.

128 Circuit Court of the United States for the Southern District of New York.

JOSEPH H. BERRY & Others
vs.
JOSIAH H. DE WITT & Others.

SHIPMAN, *J.*:

This is a motion by the defendants for a new trial. The questions of law arising upon the bill of exceptions were not argued by the defendants' counsel at any length. I shall not, therefore, enter into a written examination of these questions, but leave them for the consideration of the appellate court.

The defendants' counsel relied, before me, for a new trial upon the alleged prejudice and the manifested antagonism of some of the jurors against the defendants' case. That some of the jury did indicate by their language and manner in the jury-box during the progress of the trial that their minds were opposed to the defendants'

case is true; but I do not think that this is a ground for a
129 new trial where there is no adequate reason to suppose that any juryman was not impartial when the trial commenced, and when no improper means were taken by the plaintiff- to cause a too hasty or a prejudiced decision. The alleged misconduct of a juror in conversing with one of the plaintiffs during the trial and expressing an opinion upon the case is strongly denied by the person with whom he is said to have conversed. If the allegation was true the conversation was overheard and was understood by one of the defendants' counsel, and was not brought to the notice of the court. Such misconduct of a juror during the trial, if known to the party at the time of its occurrence and not made the subject of a motion to the court, is waived. A party cannot know during the trial a fatal objection arising from the misconduct of a juror upon the trial and keep silence and take advantage of it in the event of an adverse verdict. He is not permitted to "speculate upon the chances of a verdict." (State *v.* Fuller, 34 Conn., 280.)

The motion for a new trial is denied.

130 Henry E. Tremain, for the motion; John E. Parsons, against the motion.

(Endorsed:) Circuit court U. S., south. dist. N. Y. Joseph H. Berry *et al. vs.* Josiah H. De Witt *et al.* Opinion, Shipman, J. U. S. circuit court. Filed June 16, 1886. Timothy Griffith, clerk.

131 *Assignment of Errors.*

Supreme Court of the United States.

JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr., Plaintiffs in Error,
against
JOSEPH H. BERRY and THOMAS BERRY, Defendants in Error.

Afterwards, to wit, on the second Monday of October, in the October term, 1886, before the justices of the said Court, at the Capitol in Washington, come the said plaintiffs in error, by Tremain & Tyler, their attorneys, and say that in the record and proceedings aforesaid there is manifest error in this, to wit:

In each and every of the several rulings of the court to which exception was taken, and in the refusals of the court to admit testimony as excepted to, and in the refusals of the court to exclude testimony to the admission of which due objection was made and exception taken, and in the refusal of the court to submit all of the testimony to the jury as excepted to, and in the charge of the
132 judge to the jury, and in the refusals of the court to charge the jury as duly prayed for by plaintiffs in error, and in other respects where exceptions were taken and allowed, as more fully and at large appear by the bill of said exceptions, as the same appear of record; and that by the record aforesaid it appears that judgment aforesaid in form aforesaid given was given for the said defendants in error against the said plaintiffs in error, whereas by the law of the land the said judgment ought to have been given for the said

plaintiffs in error against the said defendants in error; also there is error in the refusal of the court to set aside the verdict for the reasons stated in a certain notice dated April 17th, 1886, and in the order dated June 5th, 1886, the said order being unwarranted by law and erroneous in terms.

And the said plaintiffs in error pray that the judgment aforesaid for the errors aforesaid and other errors in the record and proceedings, as the same appear more fully therein, may be reversed, annulled, and altogether held for nothing, and that they, the plaintiffs in error, may be restored to those things which they have lost by occasion of said judgment, &c.

(Signed) TREMAIN & TYLER.

(Endorsed:) U. S. circuit court. Filed Aug. 20, 1886. Timothy Griffith, clerk.

133 Supreme Court of the United States.

JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr., Plaintiffs in Error,
against
JOSEPH H. BERRY and THOMAS BERRY, Defendants in Error.

Afterwards, to wit, on the second Monday of October, 1886, the said Joseph H. Berry and Thomas Berry, by P. Q. Eckerson, their attorney, freely come here into Court and say that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid, and they pray that the said Supreme Court of judicature, before the justices thereof now here, may proceed to examine the record and proceedings aforesaid as to the matters
134 aforesaid above assigned for error, and that the judgment aforesaid in form aforesaid may be in all things affirmed, &c.

Yours, &c., P. Q. ECKERSON,
Attorney for Defendants in Error.

CITY & COUNTY OF NEW YORK, *ss:*

James Connolly, being duly sworn, says that he is clerk in the office of P. Q. Eckerson, attorney for the defendants in error herein; that on the 20th day of August, 1886, he served a copy of the within joinder in error by leaving same at the office of De Witt & Schatz, attorney for pl'ffs in error herein, at 206 Broadway, in the city of New York.

JAMES CONNOLLY.

Sworn to before me this 8th day of Oct., 1886.
[L. S.] EDSON C. MARSHALL,
Notary Public, N. Y. Co.

(Endorsed:) U. S. Supreme Court. Josiah H. De Witt & *al.*, pl'ffs in error, *vs.* Joseph H. Berry & *al.*, def'ts in error. Joinder in error. P. Q. Eckerson, att'y for def'ts — error. U. S. circuit c't. Filed Oct. 8th, 1886. Timothy Griffith, clerk.

135 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

JOSEPH H. BERRY and THOMAS BERRY
vs.
JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.

Know all men by these presents that we, Josiah H. De Witt, Josiah H. De Witt, Jr., Sarah R. Morse, and Thomas N. Bolles, all of the city of New York, are held and firmly bound unto the above-named Joseph H. Berry and Thomas Berry in the sum of thirty-five hundred dollars, to be paid to the said Joseph H. Berry & Thomas Berry; for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the twelfth day of July, in the year of our Lord one thousand eight hundred and eighty-six.

Whereas the above-named Josiah H. De Witt & Josiah H. De Witt, Jr., have prosecuted an appeal to the Supreme Court of the United States by writ of error to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that, if the above-named Josiah H. De Witt & Josiah H. De Witt, Jr., shall prosecute said appeal to effect and answer all damages and costs if they shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

(S'g'd)	JOSIAH H. DE WITT.	[L. S.]
(S'g'd)	JOSIAH H. DE WITT, JR.	[L. S.]
(S'g'd)	SARAH R. MORSE.	[L. S.]
(S'g'd)	THOS. N. BOLLES.	[L. S.]

Sealed and delivered and taken and acknowledged this 12th day of July, 1886, before me, by the said Sarah R. Morse.

(S'g'd) CHARLES M. DAVISON,
United States Commissioner, Northern District of New York.

Sealed and delivered and taken and acknowledged this 14th day of July, 1886, before me, by said Josiah M. De Witt and Josiah M. De Witt, Jr.

[NOTARIAL SEAL.] (S'g'd) CHARLES LYONS, JR.,
Notary Public, N. Y. Co.

136 UNITED STATES OF AMERICA.

NORTHERN DISTRICT OF NEW YORK, } *ss:*
County of Saratoga, Town of Saratoga Springs, }

Sarah R. Morse, being duly sworn, doth depose and say that she resides at No. 518 Madison avenue, New York city, and that she is

worth the sum of seven thousand dollars over and above all her just debts and liabilities.

(S'g'd) SARAH R. MORSE.

Sworn to this 12th day of July, A. D. 1886, before—

[U. S. Comm'r's Seal.]

(S'g'd) CHARLES M. DAVISON,

United States Commissioner, Northern District of New York.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Sealed and delivered and taken and acknowledged this 14th day of July, 1886, before me, by said Thomas N. Bolles.

[NOTARIAL SEAL.] (S'g'd) R. W. ROBINSON,
Notary Public, Kings County.

Certificate filed in N. Y. Co.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Thomas N. Bolles, being duly sworn, doth depose and say that he resides at cor. 74th St. & Madison avenue, in the city of New York, and that he is worth the sum of seven thousand dollars over and above all his just debts and liabilities.

(S'g'd) THOS. N. BOLLES.

Sworn to this 14th day of July, 1886, before me—

[NOTARIAL SEAL.] (S'g'd) R. W. ROBINSON,
Notary Public, Kings County.

[Endorsed:] U. S. circuit court. Joseph H. Berry and ano. *vs.* Josiah De Witt and ano. Bond for costs on appeal to the supreme court and to stay proceedings on judgment. Henry C. De Witt, attorney for defendants. Approved July 14, 1886. (S'g'd) Chas. L. Benedict. U. S. circuit court. Filed Jul. 15, 1886. Timothy Griffith, clerk.

137 UNITED STATES OF AMERICA, *ss:*

To Joseph H. Berry and Thomas Berry, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and eighty-six, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Josiah H. De Witt and Josiah H. De Witt, Jr., are plaintiffs in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Dated July 14, 1886.

CHAS. L. BENEDICT.

138 [Endorsed:] U. S. Supreme Court. Josiah H. De Witt & Josiah H. De Witt, Jr., plaintiffs in error, against Joseph H. Berry & Thomas Berry, defendants in error. Citation. U. S. circuit court. Filed July 17, 1886. Timothy Griffith, clerk.

I hereby acknowledge service of the within citation this 15th day of July, 1886.

P. Q. ECKERSON,
Att'y for Def'ts in Error.

Endorsed on cover: S. New York C. C. U. S. No. 449. Josiah H. De Witt and Josiah H. De Witt, Jr., plaintiffs in error, *vs.* Joseph H. Berry and Thomas Berry. Filed October 13, 1886.

Supreme Court of the United States,

OCTOBER TERM, 1889.

No. 173.

JOSIAH H. DE WITT and JOSIAH H. DE WITT, JR.,
Plaintiffs in Error,

AGAINST

JOSEPH H. BERRY and THOMAS BERRY,
Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTICT OF NEW YORK.

Statement of the Case.

This writ of error is brought to review a judgment entered upon a verdict for two thousand and thirty-six $\frac{25}{100}$ dollars ($2,036.25) in favor of the defendants in error, on the 6th day of November, 1885 (Rec., fols. 34 to 38).

The plaintiffs in error claimed $10,000 damages against defendants in error upon an alleged fraudulent

breach of contract; and upon defeat of this counter-claim bring this writ of error.

The action was brought for goods sold and delivered by defendants in error to plaintiffs in error, consisting of varnish, etc., alleged to be of the value of about sixteen hundred and eighty-seven and $\frac{51}{100}$ dollars ($1,687.51) (Rec., fol. 5). Plaintiffs in error answered, admitting that defendants in error had agreed to sell to plaintiffs in error merchandise of about the value alleged, but denied that the goods delivered were the goods plaintiffs in error had bargained for; and, second, set up by way of counter claim that defendants in error had agreed on or about June 24th, 1881, to sell and deliver to plaintiffs within one year thereafter, 20 barrels of "*turpentine copal varnish*" at 65 cents per gallon, and 80 barrels "*turpentine japan dryer*" at 55 cents per gallon, two barrels of one and 8 barrels of the other to be delivered each month commencing September, 1881. That defendants in error had fraudulently substituted inferior goods which *they* falsely called a *japan* varnish and which were not *turpentine* goods but were known as "union goods," and that plaintiffs in error, supposing that they were the goods they had contracted for, used them in their factory in preparing the wares they manufactured, and by reason of the adulterated character of said goods, the plaintiffs in error suffered a damage of ten thousand dollars, because the paint and varnish made from these goods did not adhere to the wares and wire cloth upon which they put it, and their manufactured articles were consequently destroyed or greatly impaired in value (folios 21 to 24). Defendants in error replied that the goods they delivered were in accordance with the agreement, and that if plaintiffs in error had suffered damage, it was solely through their own negligence (folios 25, 26). The writings between the parties were as follows:

BROOKLYN, N. Y., June 24th, 1881.

We hereby agree to deliver to Messrs. J. H. De Witt & Son, at their factory in Brooklyn, in N. Y., eighty (80) barrels of japan, and twenty (20) barrels of varnish within one year from date, these goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample barrels delivered.

Turpentine copal varnish, at 65 cents per gallon.

Turpentine japan dryer, at 55 cents per gallon.

Each shipment to consist of eight barrels japan and two barrels varnish, to be made once a month commencing September next. The terms on each shipment, six months without interest.

BERRY BROTHERS,
per A. HOOPER,
Manager.

We hereby accept the above proposition.
J. H. DE WITT & SON.

Brooklyn, June 24th, '81 (fol. 42).

Shipments commenced in September, and the shipments for September and October, were paid for before any question arose. From November, 1881 to May, 1882, deliveries were made, and in each instance bills rendered referring to so many barrels of "T. japan" or "T. copal" as were delivered (folios 43 and 55). It is in evidence that the letter "T" in those bills stands for turpentine (fol. 43). Defendants in error knew what the business of plaintiffs in error was; one of the ways in which they recommended themselves to the attention of plaintiffs in error was that they had been for some time furnishing the DeWitt Wire Cloth Company with the same goods. That company was a rival of plaintiffs in error, and was engaged in the same business. The agent who made the sale also testifies that "he knew" (fol. 45) "that they

(plaintiffs in error) were engaged in the manufacture of green wire cloth for mosquito netting, and used this japan and this varnish to mix the paint with to put it on." It transpires that the DeWitt Wire Cloth Company also sent back some of these goods at about the same time (fol. 66). By letter dated May 1st, 1882 (fol. 51) the agent of defendants in error wrote to plaintiffs in error, "Replying to your favor of the 29th instant, we would say that the varnish and japan that we have been sending you is exactly as agreed, the very same the DeWitt Wire Cloth Co. use; and *turpentine* goods." In April or May, 1882, plaintiffs in error first discovered that something was the matter with the goods (fol 56). They commenced to manufacture from the goods, and to use the varnish in August, 1881, but the goods would not, in the ordinary course of business, reach the consumer until about the following May (fol. 67). In the fall of that year, large quantities of the wire cloth were returned because the paint came off, and the balance that they had on hand was unsalable for the same reason, and had to be cleaned off and repainted (fol. 67).

Upon the trial of the case, defendants in error first took the position that they had sufficiently complied with their contract if they delivered goods that were "exactly the same quality as they made for the De Witt Wire Cloth Company, and corresponded to sample," without regard to the question as to whether they were *turpentine* goods (fols. 43–44, 52, 55, 58–62). Plaintiffs in error, on the contrary, claimed that under the contract they were entitled to be furnished with goods that commercially answered to the description of "*Turpentine* Copal Varnish" and "*Turpeatine* Japan Dryer" (fols. 48, 64). They also claimed that as the composition of the goods delivered was unknown and the ingredients could not be discovered except by analysis until after actual use, plaintiffs in error were not concluded by their acceptance and use of these goods,

because the defect was a concealed one. The Court ruled in favor of plaintiffs in error upon these two points; and the question to be decided by the Court and the jury was, Whether these goods answered to the commercial description of "*Turpentine* Copal Varnish" and "*Turpentine* Japan Dryer."

The determination of these questions rested upon two others, to wit: First, what were the ingredients or what was the composition of the goods, so far as the presence of *turpentine* and its equivalents and other necessary ingredients in the manufacture was concerned. Second, by what commercial names were articles of such composition bought and sold in trade, as tested by the presence of *turpentine* and its adulterant equivalents in such articles. The answer proffered by defendants in error to the first of these questions as given by defendants in error is shown at folio 96, where Mr. Herbert Walker, their foreman (who had testified at folio 62 that he was charged by defendants in error with the duty of fixing the ingredients in all cases where they manufactured the goods), testified that he uniformly used in making these goods fifty per cent. of turpentine and fifty per cent. of benzine (fol. 96). Plaintiffs in error, on the other hand, showed that the analysis of these goods by Professor Doremus proved that the liquid part of the mixture was 44.25 per cent., and of this only 6.33 per cent. was turpentine and 38.02 per cent. was benzine (fol. 80); and the analysis of Mr. Arvine showed that these goods contained 42 per cent. of benzine and only 10 per cent. of turpentine (fol. 76). So that in answer to the first question, the only evidence in the case was either that the goods contained an equal percentage of turpentine and benzine, as claimed by the defendants in error, or less than 10 per cent. of turpentine and about 40 per cent. of benzine, as claimed by plaintiffs in error. The answer to the second of these questions, to wit, what proportion of turpentine and benzine in the article

constituted a *turpentine* or *benzine* article specifically in trade was, as plaintiffs in error contended in the evidence without exception, to the effect that, the article to be known as a "*turpentine* japan dryer," or "a *turpentine* copal varnish," must contain either very little or no benzine, and be made of turpentine. That if made of benzine without turpentine, it was called in trade a *benzine* japan dryer or a *benzine* copal varnish. And where the article contained half benzine and half turpentine it was called a "*turpentine and benzine*" japan dryer or copal varnish.

There is no dispute that the evidence of John Bailey, salesman for C. T. Reynolds & Co. (fols. 69, 70); John S. Page, a member of F. W. DeVoe & Co. (fols. 72, 73); S. D. Chase, a manufacturer of varnish of twenty-five years experience (fol. 73); James Langmeyer, salesman of Harrison Brothers & Co. (fols. 73, 74); John A. Edmendorf of the firm of Edward Smith & Co. (fols. 78, 79); was uniformly to the effect that "turpentine" in these goods meant turpentine unadulterated by benzine, and "benzine" used alone meant that there was no turpentine; and "turpentine *and* benzine" described an article in which there was either an equal or nearly equal quantity of "turpentine and benzine." The only testimony in the case that was claimed in any way to conflict with this was that of Louis H. Wood, given at fol. 79. It is as follows:

"I am a manufacturer of varnishes, japans and dryers; have been in the business for fifteen years. Turpentine japan dryer and turpentine copal varnish are commercial names used in the trade. We sell turpentine japan for a good many purposes, but we don't suppose that by calling it turpentine japan or giving it the word "turpentine" that it means alone that it must contain turpentine and nothing else. We consider that where the greater per cent, of turpentine is used in a varnish or dryer its name is given turpentine, and it is called turpentine whether it is a japan or varnish. What

it is commercially called is governed a good deal by the price. An article containing anything under half benzine would be called turpentine; over half would be called a union B. and T. T. japan is the turpentine. B. and T. is equal parts, half and half, and B means all benzine—that is as I consider it.

Being cross-examined, he said:

If an article did not contain more than fifty per cent. of benzine it would be called turpentine.

Upon being redirectly examined by defendants' counsel, he said:

Fifty per cent. of turpentine and fifty per cent. of benzine makes a union, or half and half, or a B. and T., as some call it. "*An article containing rosin 47 per cent., turpentine 6 per cent, benzine 38 per cent., and manganese 7 per cent., and the balance miscellaneous substances would, in my opinion, be called a* BENZINE *dryer*" (This is the established analysis of the goods in controversy.)

Therefore, when the testimony closed the case was in this condition. Defendants in error had proved affirmatively that the goods which were the subject of the controversy contained one-half turpentine and at least one-half benzine.

Plaintiffs in error had proved, as they claimed by entirely uncontroverted evidence, that such goods were not commercially known as *turpentine* goods, but were known as turpentine and benzine goods.

With the evidence in this condition counsel for plaintiffs in error asked the Court to charge the jury "that the evidence shows without contradiction that goods compounded of an equal quantity of turpentine and benzine are commercially designated and generally known in trade as "turpentine and benzine" or "union" goods (see Third request, fol. 107). And the Judge refused to charge as thus requested, and counsel for plaintiffs in error excepted to such refusal. This is the subject of the first assignment of error.

Upon this point the record shows that the Judge charged as follows:

"The case comes down, then, to the question *whether these articles were commeacially known as turpentine japan* and so forth, and this question is to be decided by a preponderance of the testimony."

"The defendants say and have introduced sundry witnesses who are in the business of manufacturing japan and varnishes who say that "turpentine japan" and 'turpentine varnish' mean articles containing pure turpentine or turpentine mixed with benzine, and that the articles containing a substantial admixture of benzine and turpentine are called 'turpentine and benzine' japan, and so forth. Mr. Bayley, Mr. Page, Mr. Elmendorf, Mr. Brooks, Mr. Neefus all testify in substance that 'turpentine japan dryer' means an article composed, so far as the liquid is concerned, of pure turpentine."

"I understand that Mr. Wood testifies (and this is the position of the plaintiffs) that an article of which the liquid portion is half turpentine and half benzine is commercially known as 'turpentine japan.' The plaintiffs say that these other witnesses whose names I have mentioned, Mr. Bayley, Mr. Page, &c., are talking when they speak on the subject of their own high-priced articles and not of an article which they they do not manufacture themselves, and that this article of the plaintiffs was a well-known article and universally understood to be a cheap and mixed article, but coming under the commercial name of 'turpentine.' Now, then, the point for you to decide in this part of the case is this:"

"Is an article of which the liquid is composed in equal parts of turpentine and benzine the article commercially known as turpentine japan, or do the requirements of the trade demand an article composed exclusively of pure turpentine or in which the turpentine so

largely preponderates that benzine is but a very small portion ?"

"*If you find that plaintiffs are right in this matter, why then you come to the question whether their article, which they in fact furnished, was an article which was commercially known as "turpentine japan"; in other words, whether the article which they furnished was composed of equal parts of turpentine and benzine,* and upon this point the defendants introduce the testimony of Professor Doremus and Mr. Arvine to show that upon any theory which can be adopted in regard to the proportions of the liquid, this article which was furnished was not equal to the requirements of the contract and the requirements which I have given you. You recollect their testimony."

"The question then comes to this: Is the testimony of Professor Doremus and Mr. Arvine to be relied upon as an accurate analysis of the goods which were sold in 1881–1882 to the defendants? If it is, then it can hardly be questioned that the goods were not commercially a turpentine article."

"On the other hand, the plaintiffs' testimony is (and that you will recollect) that the goods were prepared according to their ordinary and universal formula for this particular brand or branch of trade, and that the article was composed of an equal proportion of the two liquid ingredients" (see Record, fols. 101 and 102).

Plaintiffs in error excepted to the foregoing charge at fol. 105, as follows:

"I take the benefit of an exception to that part of the charge which speaks of witnesses testifying as related by the Court in the charge. We contend that it has not been properly digested by the Court in the paragraph on that topic."

That is to say, plaintiffs in error asked for instruction to jury that according to evidence goods one-half turpentine and one-half benzine are commercially known as "turpentine and benzine" goods. Instead

of this the Judge charged the jury that defendants in error claimed that according to Wood's testimony, goods one-half turpentine and one-half benzine was a turpentine article; and then left it to the jury to say whether the article which plaintiffs furnished was composed of equal parts of turpentine and benzine. We asked for a fish and the Court gave us a scorpion. This is the subject of our second assignment of error.

Defendants in error introduced no testimony controverting the position of plaintiffs in error that an article made, as they admitted theirs was, one-half turpentine and one-half benzine, was commercially known as a turpentine and benzine article, but they befogged the case by testimony given by defendants in error personally or by their confidant, Mr. Hooper, and their superintendent, Mr. Walker, to the effect that defendants in error sold those adulterated goods under these brands, and had so sold them for a long series of years. Plaintiffs in error claimed that this testimony was immaterial and irrelevant. The record upon this point shows the following situation: Q. By counsel for defendants in error to Mr. Hooper, his own witness: "How are the barrels containing the japan and varnish marked by Berry Brothers, so as to designate them?" Defendant's counsel: "We object to that as immaterial how plaintiffs marked their goods; we have no objection to the witness testifying as to what the two designations may be, or in respect to the commercial usage of the trade in those goods, but we do object to the specific usage of Berry Brothers with a view of influencing the jury as to any actual trade designations; we object to the question as immaterial, irrelevant and incompetent. The Court overruled the objection, and defendants' counsel duly excepted.

A. The barrels were painted red, the bodies blue, the heads marked in large letters "T. Copal and T. Japan from Berry Brothers, Detroit" in stencil, and

so with the two sample barrels, the goods were all packed in the same way, contained in barrels marked 'T. Copal' and 'T. Japan' " (See Rec., fols. 57 and 58). Also,

Joseph H. Berry, one of the defendants in error, being examined by counsel for defendants in error, at fol 96, testified : Q. Do you know the brands of varnish and dryer mentioned in this contract ?

Defendants' counsel objected that it was immaterial and irrelevant what the *brands* were, and that the *witness was not shown to be acquainted with commercial or trade designations* in the City of New York, where the contract was made. Which objection was overruled by the Court, and defendants' counsel duly excepted.

A. I do. Q. How long have Messrs. Berry Bros. been making and selling varnish under those names?

Defendant's counsel objected the same as before, and the Court overruled said objection, and defendants' counsel duly excepted.

A. A number of years ; I have had practical knowledge in the manufacture of varnish and japans upwards of twenty years. I *originally* made *the formula* for manufacturing these articles, or it was made under my supervision about ten years ago. Q. Now, from that time to this, have you been making and selling extensively *according to the formula* and *under those names ?*

Defendants' counsel duly objected on the ground that it was irrelevant and incompetent and immaterial, and as calling for testimony respecting the commercial designations, when the witness had not been qualified ; which objections the Court overruled, and defendants' counsel duly excepted.

A. Yes, we have ; we have been sending it all over the country.

This is the subject of the third assignment of error.

Plaintiffs in error insisted that defendants in error were obliged to furnish a *merchantable article* of *turpentine* japan drier, and *not* one that was *so adulterated with*

inferior ingredients that it was *utterly unfit for the use* for which it was *intended and sold under its trade name.* The Court excluded all such evidence, and counsel for plaintiffs in error duly excepted. The record shows the following. At folio 76, Freeling W. Arvine, an expert practical chemist, who had for many years manufactured benzine (see fol. 78), was asked, Q. "What are the characteristics of a *turpentine japan drier* that are required for applying it for a paint to an article similar to that wire screen cloth that is here in Court? To which plaintiffs' counsel objected that it was not material to the issue here; the Court sustained the objection, and excluded the question; to which defendants' counsel duly excepted." Again at folio 77: "Q. Could the article you analyzed be used, in your opinion, *with any paint* by Mr. DeWitt's process, or the process of the DeWitt Wire Cloth Co.? To which question plaintiffs' counsel objected, and the Court excluded the same, and defendants' counsel duly excepted to such ruling." And counsel for plaintiffs in error also requested the Court to charge the jury as follows: "The contract being executory in its nature, that is, to be performed at a future time, the plaintiffs must show, in order to entitle them to recovery, not only that they delivered to the defendants the article recognized in commerce as '*turpentine* japan drier,' but also that the article delivered was a *fairly merchantable* and *salable article under that description* (see seventh, eighth and ninth requests); which requests the Court refused, and counsel for plaintiffs error duly excepted to such refusal. This is the subject of the fourth, fifth, sixth and seventh assignments of error.

Plaintiffs in error claimed that they were entitled to recovery, as and for their damages, the difference between the value of the wire cloth they had painted with the Berry Brothers japan and drier as so painted with that article; and the same wire cloth painted in the usual way with a turpentine article of the character

contracted for. The Court refused to allow this rule of damages. This appears by the Record at folio 85 as follows: "Q. (By defendants' counsel) How much less was the wire cloth worth painted with the Berry japan drier by your process than it was worth or would have been worth painted in the usual way with the turpentine japan drier of the character contracted for or of the character you usually used; to which question plaintiff's counsel objected, and the Court sustained the objection, and defendants' counsel duly excepted. Q. Was the cloth painted by your process while using the Berry japan that was delivered under this order worth more or less per yard than the cloth painted in the usual way with a fair article of turpentine japan drier? To which question plaintiffs' counsel duly objected; and the Court sustained the objection; and defendants' counsel duly excepted."

Also at folio 112, counsel for plaintiffs in error requested the Court to charge that one measure of damages in such a case is the difference between the value of the defendants' wire cloth manufactured with the article the Berry Brothers furnished, and such cloth manufactured with the article Berry Brothers agreed to furnish, (see 21st request). The gains or profits prevented as well as actual losses accrued directly dependent on plaintiffs' failure to deliver the goods contracted for, are proper to be included in the jury's measure of damages (see 22d request). These requests the Court refused to charge, and counsel for plaintiffs in error excepted to such refusal. This is the subject of plaintiffs eighth, ninth, tenth and eleventh assignments of error.

Other specifications of error have been included among the assignments and will appear under that head in this brief.

Specifications of Error.

FIRST. The Court erred in refusing to charge the jury as requested by plaintiffs in error in their third request: "The evidence shows without contradiction that goods compounded of an equal quantity of turpentine and benzine are commercially designated and generally known in trade as 'turpentine and benzine' goods or 'union goods'" (see Rec., fol. 106).

As we have shown in the recital from the Judge's charge, in the statement of facts heretofore given, the Court not only refused to charge as requested by plaintiffs in error, but in direct contradiction of that request did charge that there was an issue raised by the testimony of the witnesses as to whether an article that was one-half turpentine and one-half benzine was a turpentine article, although in reality no such issue was presented by the testimony, and it was one that was created by the Court in favor of defendant in error (Record, fol. 102).

SECOND. The Court erred in charging the jury that "Mr. Wood testified, and that this was the position of defendants in error; that an article, of which the liquid portion is half turpentine and half benzine, is commercially known as 'turpentine japan'" (Rec., fol. 101). The testimony of Mr. Wood referred to is as follows: "I am a manufacturer of varnishes, japans and driers; have been in the business for fifteen years. Turpentine japan drier and turpentine copal varnish are commercial names used in the trade. We sell turpentine japan for a good many purposes, but we don't suppose that by calling it turpentine japan, or giving it the word 'turpentine,' that it means alone that it must contain turpentine and nothing else. We consider that where the greater per cent. of turpentine is used in a varnish or drier, its name is given turpentine, and it is

called a turpentine whether it is a japan or varnish. What it is commercially called is governed a good deal by the price. An article containing anything under half benzine would be called turpentine; over half would be called a union B. and T. T. japan is the turpentine. *B. and T. is equal parts, half and half;* and B. means all benzine—that is, as I consider it.

Being cross-examined, he said: If an article did not contain more than fifty per cent. of benzine it would be called turpentine.

Upon being redirectly examined by defendant's counsel he said: "*50 per cent. of turpentine and 50 per cent. of benzine makes a union, or half and half, or a B. and T. as some call it.* An article containing rosin 47 per cent., turpentine 6 per cent., benzine 38 per cent. and manganese 7 per cent., and the balance miscellaneous substances would, in my opinion, be called a benzine drier."

Rec., fols. 79 and 80.

Every other expert witness in the case testified that to be a terpentine article in commerce it must be unadulterated with benzine.

Plaintiffs in error excepted to charge at folio 105.

THIRD. The Court erred in allowing the defendants in error, against the objection and exception of counsel for plaintiffs in error, to give evidence as to how the packages or barrels containing the japan and varnish in controversy were marked by Berry Brothers, and evidence as to brands, and also evidence as to the names under which they had been selling the said articles, and as to the time during which they had sold said articles under those names, and as to how extensively they had sold them.

The record shows the following: Q. By counsel for defendants in error to Mr. Hooper, his own witness: "How are the barrels containing the japan and varnish

marked by Berry Brothers, so as to designate them? Defendants' Counsel: We object to that as immaterial how plaintiffs marked their goods; we have no objection to the witness testifying as to what the two designations may be, or in respect to the commercial usage of the trade in these goods, but we do object to the specific usage of Berry Brothers with a view of influencing the jury as to any actual trade designations; we object to the question as immaterial, irrelevant and incompetent. The Court overruled the objection, and defendants' counsel duly excepted. A. The barrels were painted red, the bodies blue, the heads marked in large letters "T. Copal and T. Japan from Berry Brothers, Detroit" in stencil, and so with the two sample barrels, the goods were all packed in the same way, contained in barrels marked 'T. Copal' and 'T. Japan'" (see Rec., fols. 57 and 58).

Also, Joseph H. Berry, one of the defendants in error, being examined by counsel for defendants in error, at folio 96, testified: Q. Do you know the brands of varnish and dryer mentioned in this contract?

Defendants' counsel objected that it was immaterial and irrelevant what the *brands* were, and that the witness was *not shown* to be *acquainted with commercial or trade designations* in the City of New York, where the contract was made. Which objection was overruled by the Court, and defendants' counsel duly excepted.

A. I do. Q. How long have Messrs Berry Bros. been making and selling varnish under those names? Defendant's counsel objected the same as before, and the Court overruled said objection, and defendants' counsel duly excepted. A. A number of years. I have had practical knowledge in the manufacture of varnish and japans upwards of twenty years. I originally made the formula for manufacturing these articles, or it was made under my supervision about ten years ago. Q. Now, from that time to this, have you been making

and selling extensively according to the formula and *under those names?* Defendants' counsel duly objected on the ground that it was irrelevant and incompetent and immaterial, and as calling for testimony respecting the commercial designations, when the witness had not been qualified; which objections the Court overruled, and defendants' counsel duly excepted.

A. Yes, we have; we have been sending it all over the country" (see Rec., fol, 96).

Mr. Herbert Walker, who was the superintendent at the factory of the defendants in error, testified at fol. 95:

"Q. How extensively has that brand been distributed by Messrs. Berry Bros. between 1879 and the present time?

Objected to by defendants' counsel as immaterial, irrelevant and incompetent, and having nothing to do with the case; which objection the Court overruled and defendants' counsel duly excepted.

A. That article is sent to all parts of the United States and its use is continually increasing since 1879; that article has been made under my supervision and direction by Berry Bros."

FOURTH. The Court erred in refusing to allow plaintiffs in error to introduce evidence tending to show that the article which was the subject of the controversy in this case was not a merchantable article under the description by which it was described in the contract. Mr. Freeling W. Arvine was asked as follows, at folios 76 and 77 of the Record: "Q. What are the characteristics of a turpentine japan drier that are required for applying it for a paint to an article similar to that wire-screen cloth that is here in court?"

"To which plaintiffs' counsel objected that it was not material to the issue here. The Court sustained the objection and excluded the question. To which de-

fendants' counsel duly excepted, and asked the following questions:"

"Q. The constituent ingredients requisite to be present in a japan drier for the usual uses to which a japan drier is applied are what?"

"To which plaintiffs' counsel objected upon the same grounds as the last, and the Court asked: Does your question go any further than the element of benzine in the article? Mr. Tremain: Yes, sir; it is intended to go further. The Court: Then I exclude it in so far as it is itended to go further than benzine. To which ruling defendants' counsel duly excepted." * * *

"Q. Is resin a proper constituent in the commodity that is used for the purpose for which a japan drier is used?"

"To which plaintiffs' counsel objected and the Court sustained the objection; to which ruling defendants' counsel duly excepted."

"Q. What would be the effect of an excessive quantity of resin in a turpentine japan drier in applying it to the uses for which it is ordinarily applied?"

"To which question plaintiffs' counsel objected, and the Court excluded the same; to which ruling defendants' counsel duly excepted."

"Q. Could the article you analyzed be used, in your opinion, with any paint by Mr. De Witt's process or the process of the De Witt Wire Cloth Co.?"

"To which question plaintiffs' counsel objected, and the Court excluded the same, and defendants' counsel duly excepted to such ruling."

FIFTH. The Court erred in refusing to charge the jury as requested by plaintiff in error in their seventh request: "The contract being executory in its nature, that is, to be performed at a future time, plaintiffs must show, in order to entitle them to a recovery, not only that they delivered to the defendants the articles recognized in commerce as turpentine japan drier, but also

that the article thus delivered was a fairly merchantable and saleable article under that description" (see Rec., fol. 107).

SIXTH. The Court erred in refusing to charge the jury as requested by plaintiffs in error in their eighth request. "If the article delivered was adulterated with foreign substances which destroyed or injured it as a turpentine japan drier so as not to be commercially acceptable as such the plaintiffs did not fulfill their contract and cannot recover" (see Rec., fol. 108).

SEVENTH. The Court erred in refusing to charge the jury as requested by plaintiffs in error in their ninth request; *i. e.*, "The plaintiffs were manufacturers of japan and by their contract with defendants became obligated to furnish a merchantable and salable 'turpentine japan drier' free from latent defects that could not be ascertained by inspection" (Rec., fol. 108).

EIGHTH. The Court erred in refusing to allow plaintiffs in error to prove as their damages in this case, the difference between the value of the wire cloth they had painted as the same was painted with Berry Brothers' japan and drier, and the same wire cloth painted in the usual way with a turpentine article of the character contracted for. Josiah H. De Witt, one of the defendants in error, was asked as follows, at record, folios 85 and 86, "Q. How much less was the wire cloth worth painted with the Berry japan drier by your process than it was worth or would have been worth when painted in the usual way with the turpentine japan drier of the character contracted for or of the character you usually used?

To which question plaintiffs' counsel objected, and the Court sustained the objection, and defendants' counsel duly excepted.

BY DEFENDANTS' COUNSEL: Q. Was the cloth painted

by your process while using the Berry japan that was delivered under this order worth more or less per yard than the cloth painted in the usual way with a fair article of turpentine japan drier?

To which question plaintiffs' counsel duly objected, and the Court sustained the objection, and defendants' counsel duly excepted.

By Defendants' Counsel: Q. Please state to the jury what damages, if any, you have suffered from painting your cloth during the period in question with the Berry Bros.' turpentine drier furnished under this contract?

To which question the plaintiffs' counsel duly objected, and the Court sustained the objection, and defendants' counsel duly excepted.

Ninth. The Court erred in refusing to charge the jury as requested by plaintiffs in error in their twenty-first request, "That one measure of damages in such a case is the difference between the value of the defendants' wire cloth manufactured with the article the Berry Brothers furnished, and such cloth manufactured with the article Berry Brothers agreed to furnish (Rec., fol. 112).

It was error for the Court to charge as it did in respect to damages, as follows:

"The measure of damages is not the difference between the actual value of three and one-half million square feet and the saleable value of that quantity of a sound article, because nearly or quite three million square feet were sold at some prices and never came back to the defendants." [There was evidence that reclamations upon such goods had been made (Rec., p. 38), and that actual damages had occurred to the number of square feet specified.]

It was likewise error for the Court to charge: "The measure of damages is the exact pecuniary loss and damage to the quantity of feet which were returned and

which were on hand, said to be 430,000 square feet, and to the figured cloth, and this is covered by the expense of stripping and repainting, and the pecuniary loss which was necessarily sustained in consequence of the sale of the article made inferior by defect below what was the actual market price of sound articles at that time they were or could have been originally put upon the market" (Rec., fol. 104). All this was excepted to at page 50 of the record.

TENTH. The Court erred in refusing to charge the jury as requested by plaintiffs in error in their twenty-second request: "The gains or profits prevented, as well as actual losses accrued directly dependent upon the plaintiffs' failure to deliver the goods contracted for are proper to be included in the jury's measure of damages" (Rec., fol. 112).

ELEVENTH. The Court erred in refusing to chage the jury as requested by plaintiffs in error in their fifteenth request: "If plaintiffs delivered to the defendants under this contract an article which does not answer to the commercial designation of a turpentine japan drier, and an ordinary inspection would not discover that it was not such an article, and defendants, in reliance upon the contract, used the article in their business, they can recover of the plaintiffs any direct damage they suffered on account thereof."

Rec., fol. 110.

TWELFTH. The Court erred in not charging as requested by counsel for plaintiffs in error in their first request: "If the jury find that the goods delivered to defendants as turpentine japan drier were not the best of their kind, as guaranteed by reference to the contract with De Witt Wire Cloth Company they must find for the defendants."

Rec., fol. 105.

It will be observed by reference to the contract between the De Witt Wire Cloth Company and Berry Brothers, found at Record, folio 84, that in that contract Berry Brothers "guaranteed all the goods ordered to be the best of their kind"; and in the contract sued upon in this case (Record, folio 42) Berry Brothers stipulated "these goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York."

THIRTEENTH. The Court erred in refusing to charge the jury as requested by plaintiffs in error in their elevent request: "The plaintiffs were under an obligation to deliver the best quality of the turpentine japan drier as per contract with DeWitt Wire Cloth Company" (Rec., fol. 108). This refers to the two stipulations recited in the contracts in the foregoing twelfth specification of error.

FOURTEENTH. The Court erred in refusing to charge the jury as requested by plaintiffs in error in their fourth request: "The jury are to determine what in the commercial world (among merchants) is the article called turpentine japan drier, and they are to weigh the evidence of experts and witnesses acquainted with that line of business and to determine from the weight of testimony what the article turpentine japan drier is; and if the preponderance of testimony is in favor of defining this article as one which does not contain benzine as one of its substantial constituent ingredients, the jury must decide in favor of the defendants and award them such damages as they may have suffered under the rules laid down by this Court" (see Rec., fol. 106).

FIFTEENTH. The Court erred in refusing to charge the jury as requested by plaintiffs in error in their sixteenth request: "If the sample was not, in fact, an ar-

ticle answering to the commercial description contracted for (*i. e.*, turpentine japan drier and turpentine copal varnish), while appearing to be such, and not capable of being readily distinguished from such designated article by reason of concealed defects or constituent ingredients, discoverable only by its use, then it is not material whether the articles that were actually delivered did correspond with the sample, for that of itself would not fulfill the contract" (see Rec., fol. 110).

It was also error for the Court to refuse to charge as requested in the following seventeenth request: "The absence in the sample, or, in the article delivered, of one of the constituent ingredients recognized as essential to the merchantable article described in the contract, or the presence in sample or articles delivered of an adulterant, not a constituent ingredient of the merchantable article, is a species of fraud which the law does not accept as the basis of the performance of a legal obligation." To the refusal to charge as above defendant's counsel duly excepted (Rec., fols. 110, 111).

SIXTEENTH. The Court erred in excluding the evidence offered by plaintiffs in error as to what Mr. Hooper, the agent of defendants in error, said to Mr. DeWitt at the time the contract in suit was entered into, "about furnishing a turpentine article for the uses for which he wanted it" (Record, fol. 49).

In answer to the previous question Mr. Hooper began to tell what he said to Mr. DeWitt when he was interrupted and stopped by counsel for defendants in error.

Counsel for plaintiffs in error then asked him the following:

"Q. Did you say anything to Mr. DeWitt at that time about furnishing a turpentine article for the uses for which he wanted it, and did you make any state ment in reference to your ability to furnish him a turpentine article for that purpose, and if so, what?"

"Plaintiff's counsel objected to this as immaterial and irrelevant, and for the obvious purpose of trying to get defendants out of their contract."

"The Court excluded the question and defendants' counsel duly excepted."

Record, fol. 49.

It will be observed that we had already obtained some of the statements of Mr. DeWitt to Mr. Hooper in that conversation, and by the above question asked what preceded or followed by way of reply from the other side. In other words we were trying to elicit the whole conversation upon the subject of turpentine.

POINTS.

I.

Under the contract in this case defendants in error were bound to deliver articles that answered to the commercial description "turpentine copal varnish" and "turpentine Japan dryer."

A few cases will illustrate the position of the Courts in this matter:

In Nichol vs. Godtz, 10 Exch., 191, the plaintiff had sold to the defendant "the five under-mentioned parcels of foreign *refined rape oil* * * * warranted only equal to samples." The defendant accepted part of the oil, but refused to take the residue on the ground that it was not foreign rape oil, but a mixture of hemp and rape oil. The samples consisted of rape oil adulterated with hemp oil, and the oil tendered corresponded with the samples, and on this ground the plaintiffs con-

tended that the defendants were bound to accept the oil. The jury found that there was no usage in the trade that rape oil meant a mixture of rape and hemp oil, and found a verdict for the defendant, which the Court refused to disturb on the ground that the thing tendered must answer the description of it in the contract as to its character.

In Josling vs. Kingsford, 13 C. B. N. S., 447, the question arose as to "oxalic acid" *sold by sample*, and where a clerk of the plaintiffs had examined both the sample and the bulk and reported it of good quality. Defendant (the vendor) then wrote plaintiff, "As regards the strength of the oxalic, your friend having already examined the bulk, we decline all responsibility in this respect." The substance when delivered was analyzed and found to contain ten per cent. of sulphate of magnesia, and it was proved that the presence of this body could not be detected by mere inspection. Court charged jury that defendant could only perform his part of the contract by delivering that which in commercial language might properly be said to come under the denomination of oxalic acid. Verdict for plaintiff. On motion for new trial the Court said, "However completely the defendant may have guarded himself against contracting that the thing was of any particular quality it is not possible to construe the contract in any other way than that it was a part of the agreement that the subject of the sale should be the oxalic acid of commerce."

In White vs. Miller, 71 N. Y., 118, plaintiffs, who were market gardeners, purchased of defendants, who were growers of seeds, cabbage seed of a variety described as "Large Bristol Cabbage." The purchase was made at defendants' store. The goods were sent and billed to plaintiffs as "Large Bristol Cabbage Seeds." It was raised on Bristol cabbage stalks which were planted in the vicinity of stalks of other varieties and in consequence of the crossing of the varieties the seed

in question became impure and the plants raised from them were worthless. In an action to recover damages it was held that the sale was with warranty that the seed sold was Bristol cabbage seed; also that there was an implied warranty that such seed was free from any latent defect arising from the mode of cultivation; that whether the seed was Bristol cabbage within the warranty depended upon the fact whether it would produce under proper cultivation Bristol cabbage, not upon the origin of the stalks upon which it grew.

See also Hawkins vs. Pemberton, 51 N. Y., 200.

Henshaw vs. Robbins, 50 Mass. R., 83.

II.

The whole controversy in the case at bar centred around the question whether the goods that defendants in error delivered to plaintiffs in error were or were not "turpentine" goods.

The evidence showed conclusively that there were in commerce three well defined articles of japan and varnish, respectively denominated as turpentine varnish or japan and benzine varnish or japan and turpentine *and* benzine varnish or japan.

Common sense would indicate that these names meant what they said; that is, a turpentine article, one made of turpentine; a benzine article, one made of benzine; a turpentine and benzine article, one made of the two fluids mixed.

And this was substantially the result of the testimony.

All the witnesses having commercial experience

united in so testifying. Thus, Mr. Bailey, a salesman for twenty-nine years for C. T. Reynolds & Co., said: "Turpentine japan drier and turpentine copal varnish are trade terms and describe well-known articles in the trade. The turpentine japan drier should be made of *gums*, linseed oil, red lead, litharge and spirits of turpentine. An article that contained as one of its constituent ingredients *a substantial proportion of benzine would not pass commercially* among wholesale dealers as a turpentine japan drier; it would not be accepted if it contained any benzine. * * * A turpentine japan drier should be made of turpentine; a turpentine and benzine drier, or a T. & B. drier is made of using half turpentine and half benzine or any other proportion of either. * * * No person in the trade would accept an article having any benzine in it as a *turpentine japan drier*" (Rec., p. 31).

Mr. Page of F. W. Devoe & Co., a merchant of twenty years' experience, said: "The terms turpentine japan drier and turpentine copal varnish are commercial terms, and in trade describe a well-defined article or class of articles. A turpentine japan is known as a japan composed of turpentine and japan together. It should be composed of oil, turpentine, gum and a drier. In trade turpentine means turpentine. Under no circumstances, according to my experience as a merchant, if a contract or an order was made for a turpentine japan drier, would it be accepted in the trade as filled by a delivery of an article containing benzine" (Rec., fol. 72).

Mr. Chase, a manufacturer and dealer of twenty-five years' experience, said: "There is a commercial term generally known and recognized among paint merchants as turpentine japan drier and another as turpentine copal varnish. The turpentine japan drier is composed of one-third linseed oil and gum and two-thirds spirits of turpentine with the requisite driers. A japan drier having a large percentage of benzine in it would be

commercially described as a benzine japan drier (Rec., fol. 73).

Mr. Langmeyer, of the extensive firm of Harrison Brothers & Co., said: "The turpentine japan drier and turpentine copal varnish are commercial terms. A turpentine japan drier, as I understand it, must contain no benzine. A japan drier with a large percentage of benzine in it would be commercially described as a benzine drier" (Rec., fol. 74).

Mr. Elmendorf said: "The terms turpentine japan drier and the term turpentine copal varnish are commercial terms in use among merchants; they describe well known articles. A turpentine japan drier is a drier made of linseed oil and spirits of turpentine with other ingredients that form the drier. A turpentine japan drier with a large percentage of benzine in it would be commercially described as a turpentine and benzine drier" (Rec., fol. 78), etc., etc.

Mr. De Witt, a defendant, himself a man of extensive experience, testified: "Gums in japan are important. I regard turpentine japan drier as divided into three distinct parts, turpentine, and japan which contains the gummy and adhesive qualities, and a drier."

Mr. Wood, of fifteen years' experience as a manufacturer, said: "Turpentine japan drier and turpentine copal varnish are commercial terms used in the trade. *We* sell turpentine japan for a great many purposes, but *we* don't suppose that by calling it *turpentine japan* or giving it the word turpentine that it means alone that it must contain turpentine and *nothing* else. *We* consider that where the *greater per cent. of turpentine is used* in a varnish or drier its name is given turpentine, and it is called a turpentine whether it is a japan or varnish. What it is commercially called is governed a good deal by the price. An article containing anything under half benzine would would be called turpentine; over half would be called a union B and T. T japan is the turpentine. B and T is equal parts, half

and half. A B means all benzine; that is, as I consider it. * * * Fifty per cent. of turpentine and fifty per cent. of benzine makes a union or half and half or a B and T, as some call it. *An article containing resin, 47 per cent.; turpentine, 6 per cent.; benzine, 38 per cent., and manganese, 7 per cent., and the balance miscellaneous substances* (this being the analysis of the articles delivered, as shown at fols. 76 and 81) *would, in my opinion, be called a benzine drier*" (Rec., fol. 80).

As plaintiffs in error had received and used up the goods before they discovered their adulterated character they were not in a position to rescind the contract, but were obliged to rely upon their implied warranty that the goods were merchantable as turpentine goods and in affirmance of the contract.

This placed them in a somewhat false position so far as their defense against Berry Bros.' cause of action against them was concerned, and this rendered any mistake by the Court as to the central issue much more serious.

Plaintiffs in error claim that the Court by the error referred to in the next point caused a verdict against them when the evidence showed conclusively that defendants in error had not fulfilled their contract and were not entitled to recover, and also defeated plaintiffs in error and prevented them from recovering the very grave damages which the evidence in this case showed they had suffered by the fault of defendants in error.

III.

It was error in the Court to refuse to charge the jury as asked for in the request recited in the first assignment of error, to wit, that the evidence showed

without contradiction that goods compounded of an equal quantity of turpentine and benzine are commercially designated and known in trade as "turpentine and benzine," or "union" goods; and the Court also erred in the same direction in stating that Mr. Wood testified that an article of which the liquid portion is half turpentine and half benzine is commercially known as "turpentine japan," as stated in the second assignment of error.

By reference to the testimony of Mr. Wood, at folios 79 and 80 of the record, it will be seen that he stated specifically that "B. and T." (that is, benzine and turpentine), "is equal parts, half and half." And again, upon the re-direct examination by plaintiffs, he said: "fifty per cent. of turpentine and fifty per cent. of benzine makes a union, or half and half, or a *B. and T.* as some call it."

In the case of Parks vs. Ross, 11 of Howard, 362, it is held that an instruction to the jury that there is no evidence on which they can find for the plaintiff ought to be given whenever the evidence is not legally sufficient to warrant a verdict for plaintiff.

When there is no dispute concerning the facts it is not error for the Court to instruct the jury that the evidence does not warrant a verdict for the plaintiff if such be the law upon those facts.

Tolland vs. Sprague, 12 Peters, 300.
Schuchardt vs. Allens, 1 Wall., 369.
Merchant's Bank vs. State Bank, 10 Wall., 665.

The rule is applicable to a case where there is no dispute concerning, any single fact, affecting a material issue in the case.

In Commissioners vs. Clark, 94 U. S., 278, the Court charged the jury:

"2. That there is no evidence to go to the jury to show that the First National Bank had notice at or prior to the purchase of the bonds of the fraudulent

character of the representations made by the railway company which induced the authorities of the county to accept the bond given by the company to complete the railway as stipulated in the proposition submitted to the qualified voters of the county."

This was excepted to.

The Court (Justice CLIFFORD) says: "II. Matters of fact are involved in the exception to the second instruction. Judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence.

Ryder vs. Wombwell, Law Rep., 4 Exch., 39."

"Decided cases may be found where it is held that if there is a scintilla of evidence in support of a case, the Judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to wit; that before the evidence is left to the jury, there is, or may be in every case, a preliminary question for the Judge, not whether there literally is no evidence,, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it upon whom the burden is imposed" (Cases cited).

"Apply that rule to the question before the Court and it is clear that the ruling of the Circuit Court was correct, as there is no evidence reported in the transcript which would have warranted the jury in finding the issues for the defendants" (cases cited).

So in the case at bar there was absolutely no evidence "that an article" (as the Judge charged at fol. 101) "of which the liquid portion is half turpentine and half benzine is commercially known as 'turpentine japan,'" nor was it, as he said, for the jury to decide whether "an article of which the liquid is composed of equal parts of turpentine and benzine, the article commerci-

ally known as turpentine japan" (fol. 102); because there was no testimony tending to show such a fact; nor was there competent or proper evidence that the article actually delivered contained other than 6 per cent. of turpentine to 38 per cent. of benzine (fol. 80).

In the case at bar the Court misled the jury and got up a fictitious issue in favor of defendants in error by leading them to believe that defendants in error had given proofs that a japan or a drier whose liquid elements consisted one-half of turpentine and one-half of benzine came within the commercial description of a turpentine article; when, in fact, the defendants in error introduced no such testimony and made no such claim by any witness, and the witness upon whose testimony the Court predicated the alleged evidence was one of the witnesses of plaintiffs in error, and the testimony that he gave was not in any way open to the construction put upon it by the Court in its charge. The request presented on behalf of plaintiffs in error to the effect that there was no contradiction in the evidence as to an article composed one-half of benzine and one-half of turpentine being a turpentine and benzine and not a turpentine article, was strictly and accurately sustained by the evidence and the facts of the case.

The effect of the Judge's refusal to charge as requested in this instance and of his misstatement as to the purport of Mr. Wood's evidence was to mislead the jury into believing there was an issue when there was none presented by the evidence. In this way the minds of the jury were diverted from the real issues in the case, and the inevitable result was a mistrial and a failure of justice.

IV.

The Court erred in allowing the defendants in error, against the objection and exception of counsel for plaintiffs in error, to give evidence as to how the packages or barrels containing the japan or varnish in controversy were marked by Berry Brothers, and evidence also as to the names under which they had been selling said articles; and as to the times during which they had sold said articles under those names; and as to how extensively they had sold them as recited in the third assignment of error.

All this evidence tended grossly to mislead the minds of the jury as to the real question at issue. That question was: What were the commercial names under which articles such as the one in controversy in this suit, were bought and sold in dealings among merchants. Or, in other words, do merchants, when they use the word "turpentine" in connection with the words "varnish" and "japan" in trade, generally refer to an article whose liquid ingredients are one-half turpentine and one-half benzine? Testimony to the effect that defendants in error (Berry Brothers) had been in the habit of branding this spurious article secretly manufactured by them with the name "turpentine," and selling it as a turpentine article for a long series of years, and to a very large number of customers, was simply testimony showing that defendants in error had successfully practiced their frauds for a long time, and had never been caught; and could have no legitimate possible bearing on the question as to whether in trade the article they had so branded and sold was recognized by merchants to be a turpentine article or otherwise. On the other hand, by diverting the minds of the jury from the real question at issue, to wit, what was or what was not recognized by merchants to be a turpentine article, to the

success of so respectable a house as that of Berry Brothers in palming off adulterated goods for a long series of years, defendants in error succeeded in confusing the jury.

N. B.—The evidence here objected to was elicited from one of the defendants in error personally, and from their confidential agent, Mr. Hooper. Mr. Berry was an experienced manufacturer and dealer in varnish and japan, and yet he did not testify, and his counsel did not ask him to testify that the article he had sold and delivered to plaintiffs in error was in commerce a turpentine article.

V.

The Court erred in refusing to allow plaintiffs in error to introduce evidence tending to show that the article which was the subject of the controversy in this case was not a merchantable article, as indicated in the fourth assignment of error, and also in refusing to charge, as requested by plaintiffs in their sixth, seventh and eighth requests, that in order to comply with their contract, defendants in error must have delivered to plaintiffs in error a fairly merchantable and saleable article of turpentine japan and turpentine varnish, as indicated in the fifth, sixth and seventh assignments of error.

It is in evidence in this case that defendants in error were manufacturers, and that they knew distinctly the purposes for which the article they agreed to sell was to be used (see testimony of Mr. Hooper, fols. 44 and 45). It is also in evidence that plaintiffs in error distinctly told defendants in error that for their purpose they must have a turpentine article (see evidence of Henry

Butman at fol. 64, page 28 ; also evidence of Mr. Hooper, fol. 94). It is also in evidence in the testimony of Charles H. K. Smith, who was a practical painter employed by the DeWitt Wire Cloth Company, a rival of plaintiffs in error, using the same machine that they used, that benzine renders varnish and japan utterly useless for their purposes. In the case of Jones vs. Just, Law Reports, 3 Q. B., 197, the plaintiffs bought from the defendants " certain bales manilla hemp " expected to arrive on ships named ; and the hemp was delivered damaged so as to be unmerchantable, but still being properly described as " manilla hemp." Held that the vendors were liable, and that in such a sale the goods must not only answer the description, but must be *saleable or merchantable under that description.* MELLOR, J., in delivering the opinion of the Court, laid it down as a rule that *where a manufacturer undertakes to supply goods manufactured by himself* or in which he deals, but which the vendee has not had an opportunity of inspecting, *it is an implied term in the contract that he shall suppty a merchantable article.* In the case of *Mody vs. Gregson, Law Reports, 4 Ex., 49,* the defendant agreed to manufacture and supply 2,500 pieces of gray *shirting* according to a sample, at so much a piece, each piece to weigh seven pounds. The goods were manufactured, delivered, and accepted by the plaintiffs' agent as being according to sample, and probably were so ; but the goods contained a substance called China clay to the extent of fifteen per cent. of their weight introduced into their texture by the manufacturer, for the purpose only of making them weigh the contract weight of seven pounds ; and the goods were thus rendered *unmerchantable.* The defect was discovered on their arrival at Calcutta. The Court held that neither inspection of bulk nor use of sample absolutely excluded an inquiry whether the thing supplied was otherwise in accordance with the contract ; and that the facts that the

goods were not specific, ascertained nor inspected, and that the sample did not disclose the defect but falsely represented on its face a *merchantable article*, taken in connection with the stipulation that the goods should be of a specified weight, amounted altogether to a contract describing the goods and asserting their *merchantable* quality. The Court said: "*The contract, if truly fulfilled, would have given the buyer a merchantable article.* We need not consider whether the direction to the jury might not also be sustained upon the ground that the seller himself made the sample and must be taken to have warranted that it was one which, so far as his, the seller's knowledge went, the buyer might safely act upon."

In Hoe vs. Sanborn, 21 N. Y., 552, it is held, that upon the sale of a chattel by the manufacturer, a warranty is implied that the article sold is free from any latent defect growing out of the process of manufacture; he is in such a case, however, only liable upon implied warranty where it is proved or is to be presumed that he knew of the defect.

In the case at bar, defendants in error, being manufacturers, are chargeable both with presumption and knowledge of the defect.

In the case of *Kellogg Bridge Company vs. Hamilton, 110 U. S., 116*, this Court say:

"According to the principles of decided cases, and upon clear ground of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own. In ordinary sales the buyer has an opportunity of inspecting the article sold, and the seller not being the maker, and therefore having no special or technical knowledge of the mode in which it was made, the parties stand upon grounds of substantial equality. If there be, in fact, in the particular case any inequality, it is such the law cannot or ought not to at-

tempt to provide against, consequently the buyer in such cases—the seller giving no express warranty and making no representations tending to mislead—is holden to have purchased entirely on his own judgment. But when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture and was cognizant of any latent defect caused by such process and against which reasonable diligence might have guarded. This presumption is justified, in part, by the fact that the manufacturer or maker by his occupation holds himself out as competent to make articles reasonably adapted to the purposes for which such or similar articles are designed. When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and under the circumstances had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use."

In Macfarlane vs. Taylor, L. R., 1 Sc. App., 245, a vendor, a manufacturer, sold spirits, to be used in barter with the natives of Africa, and of a color to resemble rum. In making it resemble rum they used a substance which so alarmed the natives (because it colored their secretions) as to render the spirits unsalable. *Held*, a breach of the implied warranty that the goods should be fit for the specified purpose.

VI.

The Court erred in refusing to allow plaintiffs in error to prove the difference in value between their cloth as painted with the Berry Brothers' material and the same cloth painted with a fair article of turpentine japan and turpentine varnish, as indicated in the eighth, ninth, tenth and eleventh assignments of error. In the case of Dushane vs. Benedict, 120 U. S., p. 636, this Court say: "The damages recoverable for a breach of warranty or for a false representation include all damages which, in the contemplation of the parties or Court, the natural or usual course of things may result from the wrongful act. For instance, if a man sells hay or grain for the purpose of being fed to cattle, or such as is ordinarily used to feed cattle, and it contains a substance which poisons the buyer's cattle, the seller is responsible for the injury (French vs. Vining, 102 Mass., 132, and other cases). So if one sells an animal, warranting or representing it to be sound, which is, in fact, infected with disease, he is responsible for the damages resulting from the communication of the disease to the buyer's other animals, either in action of tort, for false representation, or in an action on the warranty," etc.

Within the principle thus stated and referred to, plaintiffs in error claim that in the case at bar defendants in error were responsible for the damages resulting from their wrongful act, according to the natural or usual course of things.

In this case defendants in error are manufacturers of the articles they sold; they knew exactly what its ingredients were; and they purposely adulterated it with a large admixture of benzine in order to cheapen it, and yet sold it under the name of turpentine, which implied in commerce that it was a superior article and unadulterated; they kept the knowledge of ingredients

secret, not even telling their agent who made the sale, nor giving their alleged formula in testimony.

The actual ingredients appear by the twice proved analysis. In selling to plaintiffs in error, they knew that the article was to be used to paint wire cloth, which use, on account of its being subjected to constant bending imposes a heavy strain upon the paint. They were also told by plaintiffs in error that only a turpentine article would answer their purpose, and the agent said they could furnish it (Rec., fols. 64 and 65).

Under these circumstances, the losses that plaintiffs in error incurred through the use of this adulterated article which defendants in error imposed upon them under the name of a good article, must have been within the contemplation of the parties in making the contract; and defendants in error ought to suffer that loss rather than the plaintiffs in error.

" Under such circumstances courts ought not to be too precise and exacting in regard to the evidence upon which to base a claim for damages resulting from loss of future profits."

Dart vs. Laimbeer, 107 N. Y. R., 664.

This was the only rule that would indemnify plaintiffs in error; the loss was easily ascertained by that rule, and it was strictly in accordance with the precedents to apply it in such a case. In the case of *White vs. Miller, 71 N. Y., 132*, the Court say: " The Referee, in fixing the damages, followed the rule laid down in *Passenger vs. Thorburn*, 34 N. Y., 634, which was also an action for a breach of warranty, in the sale of cabbage seed. The defendant in that case warranted the seed to be Bristol cabbage seed, and that it would produce Bristol cabbage. The Court held, all the Judges concurring, that the plaintiff was entitled to recover the difference in value between the crop raised from the defective seed and a crop of Bristol cabbage, such as would ordinarily have

been produced in the year in which the seed was to be sown. The learned Judge who delivered the opinion referred to a large number of authorities as sustaining the rule adopted by the Court, and, among others, to the case of *Randall vs. Roper* (E. B. & E., 84), in which it was held that in an action on a warranty, made by the defendants to the plaintiff, on a sale by the former to the latter of seed barley, that the seed sold was "chevalier" seed barley, but which was, in fact, barley of an inferior quality, the plaintiffs, who had resold the barley with a similar warranty, could recover of their vendors the loss sustained by the sub-vendees, measured by the difference between the inferior crop produced and that which might have been produced from "chevalier" barley. The case of *Passinger vs. Thorburn* was approved in *Milburn vs. Belloni* (39 N. Y., 53), and was said by the Court to be decisive of the case then under consideration. In *Woolcott vs. Mount* (36 N. J., 262) and *Fleck vs. Weatherton* (20 Wis., 392) the rule adopted in *Passinger vs. Thorburn* was approved and applied by the Court. We think the case of *Passinger vs. Thorburn* should be adhered to. It was carefully considered and decided, and we are not prepared to say that the rule there adopted is a departure from correct principle. *Gains prevented, as well as losses sustained*, may be recovered as damages for a breach of contract, where they can be rendered reasonably certain by evidence, and have naturally resulted from the breach (*Masterton vs. The Mayor, etc.*, 7 Hill, 61; *Griffin vs. Colver*, 16 N. Y., 489; *Messmore vs. The N. Y. Shot and Lead Co.*, 40 N. Y., 422). But mere contingent or speculative gains or losses, with respect to which no means exist of ascertaining with any certainty whether they would have resulted or not, are rejected, and the jury will not be allowed to consider them. Can it be said that the damages allowed in *Passinger vs. Thorburn* are incapable of being ascertained with reasonable certainty by a jury?"

In the case of *Wakeman vs. The Wheeler and Wilson Manufacturing Company*, 101 N. Y. R., 205, where the defendants had *wilfully* broken their contract with plaintiffs, to give them exclusive agencies in Mexico for a certain consideration, it was held that plaintiffs were not confined to the damages sustained by reason of the refusal of the defendant to fill orders actually given; but were entitled to recover such damages as they could show were sustained by a total breach of contract, and that prospective profits so far as they can be properly proved which would have been realized but for defendants' fault, were allowable as damages.

VII.

In case this Court shall conclude from the record that there was any issue presented by the testimony upon the question of whether the article delivered by defendants in error to plaintiffs in error was an article coming within the commercial description of a turpentine japan or a turpentine varnish, then we insist that the Court below erred in refusing to charge the jury as requested by plaintiffs in error in their fourth request, to wit, that the jury are to determine what in the commercial world among merchants is the article called "turpentine japan drier" and they are to weigh the evidence of experts and witnesses acquainted with that line of business, and to determine from the weight of testimony, what the article turpentine japan drier is; and if the preponderance of testimony is in favor of defining this article as one which does not contain benzine as one of its substantial constituent ingredients, the jury must decide in favor of the defendents, and award them such damages as they may have suffered

under the rules laid down by this Court (see Fourteenth Assignment of Error).

If we admit for the sake of the argument, that the testimony of Mr. Wood is capable of the construction put upon it by the Judge in his charge, and that there was, therefore, some evidence to go to the jury (contradicting the other evidence offered by plaintiffs in error) to the effect that a turpentine article in commerce included an article whose constituent ingredients were one-half benzine and one-half turpentine; still that evidence was so slight and given in such a contradictory and uncertain way by Mr. Wood that it was entirely overweighed by the unanimous testimony of all the other witnesses to directly the contrary effect. It must borne in mind that Mr. Wood was one of the witnesses of plaintiffs in error, and that defendants in error introduced no testimony of their own tending to prove any such conclusion as the Court has drawn from the evidence of Mr. Wood. There was, therefore, an overwhelming preponderance of proof in favor of the position taken by plaintiffs in error, and only the very slightest evidence, if any, in favor of the position which the Court said had been taken by defendants in error upon this issue; and plaintiffs in error were at least entitled to have the jury charged as asked for in the foregoing request; because under the conditions stated that request contained an accurate and perfectly fair statement of the law in this case.

VIII.

The Court erred in refusing to charge the jury as requested by plaintiffs in error in their sixteenth request, to wit: "If the sample was not in fact an article an-

swering to the commercial description contracted for, *i. e.* (turpentine japan drier and turpentine copal varnish), while appearing to be such, and not capable of being readily distinguished from such designated article by reason of concealed defects or constituent ingredients, discoverable only by its use, then it is not material whether the articles which were actually delivered did correspond with the sample, for that of itself would not fulfill the contract." See *Nichol vs. Godts* and *Josling vs. Kingsford*, quoted *supra* under the first point in this brief; and *Mody vs. Gregson*, quoted *supra* under the fifth point in this brief; *Heilbutt vs. Hickson*, *L. R., 7th Ch., 438*, and Benjamin on Sales, p. 853 (Ed. 1889). That this is the law applicable to a sale by a manufacturer is evidenced by abundant authority.

IX.

Fifteenth Assignment of Error.

The plaintiffs in error submit that independently of any other view which may be taken of the case at bar, the defendants below, in the prosecution of their counterclaim, had the right to establish that articles commercially recognized as turpentine japan drier and turpentine copal varnish, in order to be merchantable under those designations, required the presence of certain recognized constituent ingredients; and that if such recognized constituent ingredients did not exist in the articles delivered in this case, that the contract was not fulfilled; and instructions to that effect were essential to the rights of the plaintiffs in error.

It is respectfully submitted that the plaintiffs in error gave some evidence tending to show that the constit-

nent ingredients requisite to be present in a merchantable commodity designated as turpentine japan drier, were turpentine, gum and a drier (Rec., fol. 90); or "Linseed oil and spirits of turpentine with other ingredients that form the drier" (Rec., fol. 78); or one-third linseed oil and gum and two-thirds spirits of turpentine with the requisite driers (Rec., fol. 73); or "it should be composed of oil, turpentine, gum, and a drier" (Rec., fol. 72); or it "should be made of gums, linseed oil, red lead, litharge and spirits of turpentine (Rec., fol. 70); and that an article containing "resin 47 per cent., turpentine 6 per cent., benzine 38 per cent., and manganese 7 per cent. and the balance miscellaneous substances" (Rec., fol. 80), would not be a merchantable commodity as a turpentine japan drier. It was established by the testimony of Dr. Doremus (Rec., fol. 81), and of Mr. Arvine (Rec., fol. 76), that the article delivered was thus composed: the constituent ingredients requisite to be present in any japan drier in order that it should be useful and consequently merchantable, was not permitted by the Court to be proven (Rec., fols. 76 and 77); and the instruction to the jury refused, that if the article delivered was adulterated with foreign substances which destroyed or injured it as a turpentine japan drier so as not to be commercially acceptable as such, that the contract was not fulfilled. Against the contention of the plaintiffs in error when requesting the Court below to instruct the jury that the absence in the delivered article of the "constituent ingredients recognized as essential to the merchantable article described in the contract, or the presence * * * of an adulterant not a constituent ingredient of the merchantable article" (Rec., fol. 111), was no fulfillment of the contract the Court deliberately refused and negatived the defendant's position, by its erroneous exclusion of competent testimony and by its charge that narrowed the issue upon which the jury might turn the case to "whether the article which they (the vendors)

furnished *was composed of equal parts of turpentine and benzine*" (Rec., fol. 102).

That the presence of foreign ingredients will readily destroy the merchantability of any manufactured commodity would seem to be a self-evident proposition; and whether rosin or no rosin, gum or no gum, benzine or no benzine, as constituent ingredients, affect the merchantability of an article having a recognized commercial designation, would seem to be a pertinent as well as legal inquiry.

Surely if it be a fact that rosin in any substantial proportions was not "a proper constituent in the commodity that is used for the purpose for which a japan drier is used, a jury might with propriety conclude that a commodity containing about 47 per cent. of rosin (Rec., fol. 81) was not the merchantable commodity designed by the contract. Such a result, however, was impossible under the rulings of the Court below. The vendors, under the rulings of the Court below, were permitted to evade the rule that the article delivered should be "a fairly merchantable and salable article under the description of turpentine japan drier." Sand sweetened with molasses may be branded by a vendor as "sugar;" but it would scarcely be contended that in such a case a vendee could not show that in order to be merchantable as sugar, the commodity should not contain more than a maximum amount of sand; or that a vendor might successfully recover his purchase price by proving that he had successfully shipped barrels of the same adulteration under the brand of A One Sugar. Yet, if the Court ruled properly in the case at bar, an article branded as a turpentine japan, but containing adulterants that rendered it useless for the ordinary purposes for which a turpentine japan is used, and which would not be accepted among merchants as a turpentine japan, might, nevertheless, be delivered under that name and its purchase price recovered. Here was an article containing solid and liquid adul-

terants; and concerning which no witness whatever testified that it would be accepted in trade under that name; and yet the Court refused to permit the jury to hear or to inquire whether the article in question did or did not contain the substantial constituent ingredients requisite to the merchantability of the designated article; or whether there was present in its constituent ingredients substances which destroyed such merchantability under the designation of a turpentine japan drier.

X.

We respectfully submit that the judgment entered in this case in favor of defendants in error and against plaintiffs in error should be reversed and a venire *de novo* awarded.

H. Edwin Tremain,
Mason W. Tyler,
For Plaintiffs in Error.

C. G. Burgoyne's Printing Business, 146-150 Centre St., N. Y.

Office Supreme Court U. S.
DEC 19 1889
JAMES. H. McKENNEY,
CLERK.

Reply to Brief for Plaintiffs in Error.

The brief filed for Messrs. DeWitt & Son claims error in some respects which Messrs. Berry Bros. did not anticipate. There would be nothing in them if the entire record were here. There is nothing in them if the bill of exceptions is understood.

I. It was not error for the Court to refuse to charge (fol. 106) that the evidence shows without contradiction that goods compounded of an equal quantity of turpentine and benzine is commercially designated and generally known in trade as turpentine and benzine, or union goods.

(*a*) Mr. Wood, a witness for DeWitt & Son, testified on cross-examination (fol. 79), "if an article did not contain more than 50% of benzine, it would be called turpentine."

Berry Bros. proved that the article in question did not contain more than 50% of benzine (fols. 96, 97).

(*b*) The articles contracted for were defined by sample and were to be of a specified quality. They were goods sold by Berry Bros under names used by them for years (fol. 95, 97). What names other makers of varnish used or what were their ingredients was immaterial.

(*c*) The testimony of a number of business rivals of Berry Bros. upon the subject of what a turpentine article should be made of was immaterial.

The witnesses were only speaking of their own transactions. Their testimony showed that there was no uniformity upon the subject; that it was a question of price (fols. 71, 79).

JOHN BAYLEY, salesman of C. T. Reynolds & Co. (fol. 70). "I am not conversant with other houses. When I speak about terms used in the trade, I know nothing more than terms used by C. T. Reynolds & Co."

JOHN S. PAGE, of F. W. Devoe & Co. (fol. 72). "There is nothing which has such a large variety of names. They all come out of one barrel but we call them by different names."

SOLOMON D. CHASE (fol. 73). "A Japan dryer having a large quantity of benzine in it would be commercially described as a benzine turpentine dryer."

On cross-examination: "I do not publish a trade list using the term benzine Japan dryer and I do not know of any house that does. I do not know of any other house except my own which makes the article turpentine Japan dryer consisting of $\frac{1}{3}$ oil and gum and $\frac{2}{3}$ spirits of turpentine. I know nothing about other houses."

JAMES LANGMEYER (fol. 74). "Our house publishes a price list. This list describes under designated names the articles sold. Our house does not use those terms turpentine japan dryer or benzine japan dryer or turpentine copal varnish."

(*d*) There was no evidence, certainly no controlling evidence, to the effect that goods compounded of an equal quantity of turpentine and benzine were commercially designated as union goods. Mr. Wood, DeWitt & Son's witness, upon whose testimony the request was based, *testified* (fols. 79, 80), *both ways* upon the subject.

(*e*) There was no request by DeWitt & Son to take the case from the jury, or to have the Court direct a verdict. Where a case must go to the jury, the Court is under no obligation to instruct them that as to this or that fact the evidence is one way or the other.

II. It was not error for the Court to permit Berry Bros. to show (fols. 57, 58), how the barrels containing the articles in question were marked.

In no other way was it possible for Berry Bros. to offer evidence about the particular goods in question. Berry Bros. showed that those goods were contained in barrels painted red, etc., and marked in stencil in a particular way (fol. 58). They then showed by Mr. Joseph Berry (fol. 96), that he knew the goods of those brands; that they had been sold under those names for a number of years; that

he made the formula for manufacturing them ten years previously; that from that time the goods *had been made* and sold extensively, *according to the formula* and under those names; and it was proved (fol. 96), *that such goods contained 50% of turpentine.*

III. If there had been error in the instructions of the Court upon the subject of damages it would be immaterial, the jury having found that Messrs. Berry Bros. performed their contract.

IV. On examination of the cases upon which Messrs. De Witt & Son rely to make out that where goods are sold to be of a specified quality, and to correspond with samples they must be of a different quality, because goods sold by others under similar names are of a different quality they will be found not to sustain Messrs. De Witt & Son's contention.

Suppose that the goods of other makers sold under similar names contained only 5 per cent. of turpentine would that permit Berry Brothers under their contract to deliver such goods when the samples and the goods sold the Wire Cloth Company contained 50 per cent. ?

JNO. E. PARSONS,
For Berry Bros.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1889.

No. 173.

JOSIAH H. DE WITT and JOSIAH H. DE WITT, Jr.,
Plaintiffs in Error,

vs.

JOSEPH H. BERRY and THOMAS BERRY,
Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

JNO. E. PARSONS,
Of Counsel.

C. G. Burgoyne's Printing Business, Cor. Walker and Centre Sts., N. Y.

In the Supreme Court of the United States.

JOSIAH H. DEWITT and JOSIAH H. DEWITT, JR.,
Plaintiffs in Error,

VERSUS

JOSEPH H. BERRY and THOMAS BERRY,
Defendants in Error.

Brief for Defendants in Error.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Messrs. Berry Bros., defendants in error, sued in the Marine Court, an inferior Court of the City of New York, to recover $1,687.50 and interest for japan dryer and varnish (copal) sold and delivered to Messrs. J. H. Dewitt & Son, plaintiffs in error, between November 9th, 1881, and May 15th, 1882.

Vide, Complaint, pp. 2 and 3.
Written Contract, p. 15.
Bill of Particulars, p. 7.

Dewitt & Son answered denying that the merchandise contracted for was delivered.

For a counterclaim they alleged that Berry Bros. fraudulently substituted inferior articles for those contracted for; that they, Dewitt & Son, supposed that they were the articles contracted for, used them in their wire cloth factory, and that by reason of the fraudulent character of the goods Dewitt & Son manufactured wire cloth that was so injured by the goods which was used in painting, that some were returned by purchasers; and some, purchasers refused to pay for, to their damage $10,000 and upwards.

Vide answer of DeWitt & Son. pp. 8–9.

Being called upon to furnish the particulars of their claim, De Witt & Son by a sworn bill alleged that it consisted in damage to the amount of one-half a cent a square foot on 3,500,000 square feet of wire cloth, the amount of the claim being thus increased from the $10,000 asserted in the answer, to $17,500.

Vide De Witt & Son's Bill of Particulars, p. 11.

Upon the trial De Witt & Son were permitted to amend or change their claim, which they did as follows:

430,000 feet of wire returned or on hand, at one-half cent per foot	$2,150 00
Depreciation in character of goods, one cent a foot	4,300 00
Special loss of three cents a square foot on 75,000 square feet of *figured* cloth	2,200 00
General damage (!)	10,000 00
	$18,650 00

The action was tried before Mr. Justice N. SHIPMAN.

The trial began on October 23, 1885, and continued until November 6, 1885 (fol. 37).

De Witt & Son subsequently impugned the conduct of the foreman of the jury, alleging (pp. 55, 56; the allegations were proved to be impossible, pp. 57, 58), that on the second day of the trial he showed great impatience, and that on the third day he was engaged in intimate and earnest conversation with one of the defendants, in the course of which he said that he had had a very pleasant time on a fishing excursion with his brother; and in reference to their claim saying that it would never be allowed.

The jury having rendered a verdict in favor of Berry Bros., for the full amount of their claim, De Witt & Son moved for a new trial upon exceptions and for pretended misconduct; and their motion having been denied, sued out a writ of error to this Court.

The contract was in writing, and reads as follows:

De Witts' Wire Window-Screen Cloth Manufactory. Office & Factory, 1209 and 1211 De Kalb Avenue. J. H. De Witt, J. H. De Witt, Jr., proprietors.

BROOKLYN, N. Y., June 24th, 1881.

We hereby agree to deliver to Messrs. J. H. De Witt & Son, at

their factory in Brooklyn, in N. Y., eighty (80) barrels of japan and twenty (20) barrels of varnish within one year from date, these goods to be exactly the same quality as we make for the De Witt Wire Cloth Company of New York, and as per sample bbls. delivered.

Turpentine copal varnish, at 65c. per gallon.

Turpentine japan drier, at 55c. " "

Each shipment to consist of eight (8) barrels japan and two (2) barrels varnish, to be made once a month, commencing September next.

Terms on each shipment, six months, without interest.

BERRY BROTHERS,
Per A. HOOPER, Manager.

We hereby accept the above proposition.

J. H. DE WITT & SON.

Brooklyn, June 24th, '81.

Berry Brothers proved that the goods were exactly the same quality as made for the De Witt Wire Cloth Company of New York, and as per sample barrels delivered; that the sample barrels (fol. 43), were borrowed of the De Witt Wire Cloth Co., and that the goods delivered were taken indifferently and without selection, from car loads some of which went to the Company, and others to De Witt & Son (fol. 44).

There was no evidence worth considering to the contrary (Charge, fol. 100).

Berry Bros. also proved that the goods had been made and sold by them under the names mentioned in the contract for a number of years; that they were manufactured from a formula adopted ten years previously, and had been sent all over the country (fol. 97); and that they contained 50% of turpentine and 50% of benzine; that the percentage had never varied (fol. 96).

De Witt & Son claimed the right to enlarge the written contract by parole proof that there was a warranty that the goods should be suitable for their manufacture. They also contended that there was an implied warranty that the goods were merchantable and fit for the manufacture for which they were designed (fol. 46).

They were permitted (fol. 47) to prove what was said at the time of the contract as to the purpose for which the goods were intended (fol. 65).

De Witt & Son, in support of their counterclaim as finally set forth in their amended answer (p. 12), claimed that of 3,500,000 feet of wire cloth upon which they claimed to have used Berry Bros.'

varnish and dryer 430,000 feet were either on hand or returned as defective, and that on 75,000 square feet of figured cloth alleged to be of an expensive kind there was a special loss.

The claim of De Witt & Son resolved itself into the contention that for the sixty-five cents per gallon for varnish and fifty-five cents per gallon for dryer, the prices mentioned in the contract (fol. 42), they were entitled to a high priced article made exclusively of turpentine.

They examined chemists (fols. 76–80) to show that in samples of varnish and dryer submitted by them to the chemists (Berry Brothers disputed their fairness), the proportion of turpentine was much less than Berry Bros. proved to have been put in the articles delivered.

One of De Witt & Son's witnesses testified that if the article did not contain more than fifty per cent. of benzine, it was called turpentine in the trade (fol. 79). To meet the claim that (according to the disputed analysis) the japan and dryer upon some of the wire cloth upon which De Witt & Son asserted that the Berry Bros'. japan and dryer had been used contained benzine in excess, and was generally bad, Berry Bros. showed by De Witt & Son's witnesses that the latter used benzine to clean the rollers on which they rolled the wire (fol. 68); that they used adulterated paint (fol. 68); that only ten minutes was given to drying the painted cloth, and that although it did not come out sufficiently dry it was rolled as soon as it came out (fols. 68–69). And in answer to De Witt & Son's claim that when they ceased using the Berry Bros'. dryer and varnish they accomplished better results, Berry Bros. showed that De Witt & Son changed their process.

The position of Berry Bros. was that by the contract they were only compelled to furnish articles which corresponded with the samples and which were exactly the same quality as those being furnished to the Wire Cloth Company under the name of turpentine copal or varnish and turpentine japan dryer, and that it was quite immaterial what proportion of turpentine they contained or whether they contained any.

The learned Judge charged the jury (fol. 99) that by the contract Berry Bros. "agreed to furnish the defendants goods of exactly the same quality as were then being made for the De Witt Wire Company of New York and as samples delivered." But he furthermore charged, Berry Bros. claiming that in this respect the charge was unduly favorable to De Witt & Son, that the articles were to be

those "respectively *commercially* known as Turpentine Japan Dryer and Turpentine Copal Varnish."

The learned Judge left it for the jury to say (fol. 102) whether the articles furnished were commercially known as turpentine; were composed of equal parts of turpentine and benzine.

The jury, by their verdict, found in accordance with the testimony for Berry Bros., that the articles did not contain more than 50 % of benzine, and that that entitled them commercially to be called turpentine, and that they corresponded with the samples and were exactly of the same quality as articles being delivered to the Wire Cloth Company.

By exceptions to the charge and to refusals to charge as requested, De Witt & Son raise a multitude of questions. They submitted twenty-two requests as to which they except (pp. 50 to 54, etc.).

They all come down to the claim by DeWitt & Son:

1. That Berry Bros. guaranteed the varnish and dryer to be suitable for their (De Witt & Son's) manufacture.

2. That parol evidence was competent to make out such a guarantee, if it was not proved by the contract itself.

3. That Berry Bros. guaranteed that the goods were merchantable and salable (fol. 107).

4. That they guaranteed that they were free from adulteration, *i. e.*, benzine (fol. 108).

5. That although the goods corresponded with the samples, they did not fulfill Berry Bros.' contract, if they did not answer the usual commercial description of "turpentine japan dryer" and "turpentine copal varnish."

6. That the presence in the sample of adulteration not a constituent of a merchantable article is a fraud.

Berry Bros. maintain that the charge correctly instructed the jury as to the law of the case; that it was not error for the Court to decline to phrase its charge in language furnished by De Witt & Son (*N. W. Insurance Co. vs. Muskegon Bank*, 122 U. S., 501); and that in cases where the substance of requests was not charged, the request erroneously stated the law.

First. Where goods are sold by sample, and particularly where the contract requires that they shall be of the same quality as other

specified goods of a designated description, the obligation of the seller is discharged if the goods are of the agreed quality and correspond with the sample.

Sands vs. Taylor, 5 Johns., 395, 410:

BY THE COURT, KENT, C. J.: "Tho sale by sample was not a warranty as to the soundness of the cargo, nor was it so understood by the parties. The cargo corresponded with the sample in quality of grain, and that was all that was intended by the exhibition of the sample."

Second. In the case of the sale of an article of an agreed quality, there is no warranty that it shall answer the particular purpose intended by the buyer.

Beck vs. Sheldon, 45 N. Y., 365:

Head Note. "Where a manufacturer of goods, which are known in the market and the different qualities distinguished by certain numbers, contracts to sell and deliver goods from his factory of certain numbers, in an action upon the contract it is not material whether the goods delivered are of equal or inferior quality to those of corresponding numbers manufactured at other factories, or whether they are or are not merchantable."

Third. Where goods are sold by sample and the contract specifies the quality it is immaterial whether the goods delivered are or are not merchantable or salable.

Any other rule would lead to the absurdity that by a contract for an article which was defined by name, and the quality of which was fixed both by sample and by special requirement, the seller was compelled to deliver a merchantable or salable article, when the article agreed for was neither the one nor the other.

Parkinson vs. Lee, 2 East., 314:

Head Note. "Upon a sale of hops by the sample with a warranty that the bulk of the commodity answered the sample, the law does not raise an implied warranty that the commodity should be merchantable."

Jones vs. Just, L. R., 3 Q. B., 197:

BY THE COURT: "Where a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

Vide also

Benj. on Sales, § 987.

Fourth. Where a buyer purchases by sample he is entitled to and he must take goods which correspond with the sample. If goods which correspond with the sample are defective or not suitable for his purpose, he cannot complain.

Chandler vs. Hopkins, 4 M. & W., 398:

The plaintiff, being a manufacturer of furnaces, received from appellant, a brewer, the following order: "Send me your patent hopper and apparatus to fit up my brewing copper, and your smoke-consuming furnace."

Held, that there was no implied warranty that the furnace supplied should be fit for the purpose of a brewery, that the defendant having defined by their order the particular machine to be suplied, the plaintiff performed his part of the contract by supplying the particular machine.

Fifth. Parol evidence is inadmissible to vary a written contract or to add a warranty not contained in it.

Mumford vs. McPherson, 1 Johns., 414:

BY THE COURT: "The warranty alleged to have been made was that the ship was copper fastened. Upon the trial, the bill of sale was produced, which contained no such warranty. The plaintiff then offered to prove by parol that one of the defendants, after the bill of sale was executed, and before it was delivered, did to a question put by one of the plaintiffs, express himself to the effect of the warranty contained in the declaration, &c.

Admitting a parol warranty to have been fully proved, no action could have been maintained upon it. The contract between the parties was reduced to writing, and contained in the bill of sale, and recourse must be had to that instrument to ascertain its extent." *Plaintiffs nonsuit.*

Sixth. The case for the plaintiffs in error is without merit.

1. By the rulings of the Court, Berry Bros. were compelled to satisfy the jury that the articles in question contained at least fifty per cent. of turpentine, notwithstanding that the contract requirement for quality was only that they should be the same as those furnished to the Wire Cloth Company.

DeWitt & Son's answer was that this proof was contradicted by an analysis of samples, made after an interval long enough for the evaporation of the turpentine, a very fugitive article, and any excess of benzine in which could be accounted for as being contributed by De Witt & Son's use of benzine. That issue the jury decided in favor of Berry Bros., under instructions of which in that regard De Witt & Son do not complain.

2. By evidence therefore, either not in dispute, or which, if contradicted, was accepted by the jury, Berry Bros. have established that the goods delivered corresponded with the sample, were of the agreed quality, and furthermore, did contain 50% of turpentine.

The position of De Witt & Son is that notwithstanding this they were entitled by the contract to a high priced coach varnish which contains no benzine and sells for several times the price in question; and furthermore, to hold Berry Bros., as guarantors that such varnish would suit De Witt & Son's manufacture. To bring about this result, they wished to engraft upon the contract a warranty which, by offering parol testimony to prove it, they recognized it did not contain.

Neither law nor justice permits.

Seventh. The motion for a new trial was properly denied.

1. The allegations of the affidavits of De Witt & Son, upon which the motion was made, were incredible. They were flatly denied. They were shown by the answering affidavits to be impossible. This Court does not sit in review of controverted facts, even where if it entertained jurisdiction, it might reach an opinion different to that of the Court below.

2. But if the affidavits of De Witt & Son to the effect that on the

second and third days of the trial, they learned of matters which protected them against having their case tried before the jury were true, the law will not for one instant tolerate that a party may go on for ten days with the trial, take his chance of the result and, when beaten, for the first time complain.

Fox vs. Hazelton, 10 Pick, 275.
Gale vs. N. Y. C. R. R. Co., 13 Hun, 1.
Valiente vs. Bryan, 66 How., 302.

Eighth. The explanation of the case is obvious.

De Witt & Son used for painting their wire cloth the lowest grade of adulterated paint. They purchased from Berry Bros. the cheapest grade of dryer and varnish. They tried to use the dryer to eke out their paint instead of using it only as a dryer. They used a process which they subsequently discarded. They rolled up the painted cloth before it was dry.

On some of the cloth (430,000 feet out of 3,500,000 at the most), the paint cracked. They seek to hold Berry Bros. for injury to the entire 3,500,000 feet.

The jury had no choice but to treat the whole claim as a sham and a fraud, as it was. Naturally they were impatient to waste two weeks upon so baseless and unfounded a case. The case was submitted to the jury on a charge unduly favorable to De Witt & Son, the jury promptly found in favor of Berry Bros., and the judgment should be affirmed with costs.

JNO. E. PARSONS,
Of Counsel for Defendants in Error.